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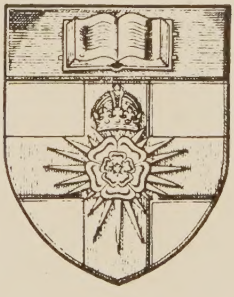

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Page	*Line*	*For*	*Read*
34	16, 17	with costs	As the Attorney-General is the Appellant the costs of the Respondents will be paid out of their testator's estate.
55	—10	gives	give
58	15	sect. 2	sect. 24
97	4	after	under
398	foot-note (2)	[1895] 1 Ch. 1, 10	[1895] 1 Ch. 3, 10.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

BOYD *v.* BISCHOFFSHEIM.

C. A.
1894
Oct. 24, 25.

[1894 B. 729.]

Practice—Appeal—Order of Single Judge of Court of Appeal—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 52—*Supreme Court of Judicature* (*Procedure*) *Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 1 (*b*).

A motion to discharge or vary an order of a single Judge of the Court of Appeal, under the 52nd section of the *Judicature Act*, 1873, is not an appeal within the meaning of the 1st section of the *Supreme Court of Judicature* (*Procedure*) *Act*, 1894, and may be made without leave of the Judge or of the Court of Appeal.

THE action in this case was dismissed with costs by Mr. Justice *North* in July, 1894, as being frivolous and vexatious. The Plaintiff appealed from this judgment. The Defendants, on the 16th of October, applied to the Lord Chief Justice, Lord *Russell*, sitting in the Vacation as a Judge of the Court of Appeal, for an order that the Plaintiff might give security for the costs of the appeal, and that the appeal might be postponed till security was given.

His Lordship ordered the Plaintiff to give security to the amount of £100 to each of the Defendants, but declined to order the appeal to be postponed till such security was given.

The Plaintiff now moved to discharge the order of the Lord

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Chief Justice, and the Defendants also moved to vary it by directing the appeal to be postponed till security had been given.

The order was made under sect. 52 of the *Judicature Act*, 1873 (1).

By the *Supreme Court of Judicature* (*Procedure*) *Act*, 1894 (57 & 58 Vict. c. 16), s. 1, sub-s. 1 (*b*), it is enacted that no appeal shall lie without the leave of the Judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a Judge, except in certain cases therein specified, none of which included the present case. No leave was obtained to make the present application.

Turrell, for the Plaintiff.

Cozens-Hardy, Q.C., and *Gregson*, for the Defendant *E. R. McDermott*.

A. Young, for the Defendant *E. McDermott*.

Pollard, for the Defendant *Bischoffsheim*.

LINDLEY, L.J., said that he was of opinion that a motion to discharge or vary the order of the Lord Chief Justice sitting as a single Judge of the Court of Appeal was not an appeal within the meaning of sect. 1 of the *Supreme Court of Judicature* (*Procedure*) *Act*, 1894, and did not require the leave of the Judge or of the Court of Appeal. In the present case the Plaintiff's motion must be refused, and the motion of the Defendants must be allowed. The appeal would, therefore, be stayed till the security was given.

(1) 36 & 37 Vict. c. 66, s. 52: "In any cause or matter pending before the Court of Appeal any direction incidental thereto, not involving the decision of the appeal, may be given by a single Judge of the Court of Appeal; and a single Judge of the Court of Appeal may at any time during Vacation make an interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit; but every such order made by a single Judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof."

A. L. SMITH, L.J., said that he was of the same opinion. The recent Act was not intended to affect nor had it affected the special enactment of sect. 52 of the *Judicature Act*, 1873.

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Solicitors: *W. C. Goulding; Hores & Pattisson; J. Holmes & Son; Freshfields & Williams.*

M. W.

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[0096 of 1893.]

In re NORTHERN TRANSVAAL GOLD MINING COMPANY.

[0186 of 1892.]

In re DELHI STEAMSHIP COMPANY.

[0073 of 1893.]

C. A. 1894 VAUGHAN WILLIAMS, J. *April* 25. C. A. *Oct.* 31.

Company—Winding-up — Public Examination—Further Report of Official Receiver—Allegation as to Fraud—Statement based on Information and Belief—Statement of Opinion—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 8, *sub-ss.* 2, 3.

Held, by *Vaughan Williams*, J., that sub-sect. 2 of sect. 8 of the *Companies (Winding-up) Act*, 1890, when it speaks of the further report of the Official Receiver stating whether in his opinion any fraud has been committed, cannot mean more than that the Official Receiver shall state that, on the information before him, uncontradicted and unexplained, he is of opinion that a *primâ facie* case is made of fraud having been committed by some person—not defining which person—falling within the description of persons mentioned in the sub-section, and that he believes such information to be true.

Whether such an expression of opinion is or is not a condition precedent to obtaining an order for public examination, it is a convenient practice which the Court will in general require to be followed before it makes such an order.

Held, by the Court of Appeal, that the Court has no jurisdiction under sect. 8 to direct a public examination, unless the Official Receiver either states expressly in his further report that in his opinion some fraud such as is mentioned in sect. 8, sub-sect. 2, has been committed, or the facts which are stated in the report shew clearly that in his opinion such a fraud has been committed.

If the report merely suggests or gives rise to a suspicion of fraud, this

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is not enough to give the Court jurisdiction to direct a public examination.

In re Trust and Investment Corporation of South Africa (1), *In re Laxon & Co.* (2), and *In re Birkdale Steam Laundry and Carpet Beating Company* (3) discussed.

ORDERS were made by the High Court of Justice for the winding up of the *General Phosphate Corporation, Limited*, the *Northern Transvaal Gold Mining Company, Limited*, and the *Delhi Steamship Company, Limited.*

In each case the Official Receiver had made a further report to the Court with reference to the company's affairs, purporting to be made in pursuance of sect. 8, sub-sect. 2, of the *Companies (Winding-up) Act*, 1890 (4), and suggesting that certain persons therein named should be publicly examined.

The Official Receiver did not, however, in any of his reports state in terms that "in his opinion any fraud" had "been committed by any person," and some of the statements in the report were based only on the information and belief of the Official Receiver.

The Official Receiver having applied in Chambers to Mr. Justice *Vaughan Williams* to consider the reports and to direct

(1) [1892] 3 Ch. 332.

(2) [1893] 1 Ch. 210.

(3) [1893] 2 Q. B. 386.

(4) By sect. 8: "(1) Where the Court has made an order for winding up a company, the Official Receiver shall, as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the Court" (*inter alia*) "(*c*) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof. (2.) The Official Receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court. (3.) The Court may, after consideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as director or officer of the company."

certain persons therein named to attend to be publicly examined, his Lordship, after considering the reports, took time to consider his decision thereon, which, on the 25th of April, 1894, was stated by him in Court, as set out below.

1894. April 25. Vaughan Williams, J.:—

The question I have to decide, before I can make the order for examination asked for in these cases, is whether or not the statement in terms by the Official Receiver in his report of his opinion that "a fraud has been committed" by some person of the class mentioned in sub-sect. 2 of sect. 8 of the *Companies (Winding-up) Act*, 1890, in the promotion or formation of the company, or in relation to the company since the formation thereof, is either a condition precedent to the jurisdiction to make the order for examination, or a condition, the presence of which the Court ought to require before making such an order, and what constitutes the expression of such an opinion?

This question has been before the Court of Appeal, and was argued by counsel in *In re Trust and Investment Corporation of South Africa* (1). The report of the Official Receiver in that case did not state in terms the opinion of the Official Receiver that fraud had been committed, but the Court nevertheless ordered a public examination. The judgment of the Court, however, was only given on an *ex parte* appeal, and was in terms only directed to the question whether the order for examination could be made on an *ex parte* application, and whether the report need indicate fraud on the part of the person ordered to be examined. Since, and in consequence of this decision, I have always thought it right to make orders if the report of the Official Receiver disclosed a *primâ facie* case of fraud, even though the report did not express in terms the opinion that fraud had been committed; and I have treated the report and application of the Official Receiver as a sufficient indication of the opinion of the Official Receiver. It seems, however, from observations of members of the Court of Appeal pending the argument in a recent case of the *New Zealand Loan and Mercantile Agency Company, Limited*, that the Court, without expressly

(1) [1892] 3 Ch. 332.

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departing from the decision in *In re Trust and Investment Corporation of South Africa* (1), and without saying that an expression in terms of an opinion by the Official Receiver that fraud has been committed was a condition of the jurisdiction of the Court to order a public examination, indicated a view that it was desirable that the Official Receiver should express in terms the opinion referred to in sub-sect. 2 of sect. 8. I, therefore, have now to consider how far I ought to require the expression in terms of such an opinion, and what the nature of the opinion thus to be expressed is.

Now, the object of the examination is manifestly to ascertain whether such fraud has been committed. It is obvious, therefore, that one should not read the section so as to make the conclusion in fact that such a fraud has been committed a condition precedent to the order for examination. The utmost that the section can mean is that the Official Receiver should state that, on the information before him, uncontradicted and unexplained, he is of opinion that a *primâ facie* case is made of fraud having been committed, and that he believes such information to be true. To give, however, to the words state "whether in his opinion any fraud has been committed," this meaning is no small departure from the literal meaning of the words; for to state an opinion that there is a *primâ facie* case that a fraud has been committed is manifestly not the same thing as to express an opinion that fraud has been committed. Some light is thrown on the meaning of the words by previous legislation, for the opinion of the Official Receiver embodied in his report seems to be made evidence by rule 333 of the Bankruptcy Rules of 1886, and the object of the Legislature generally would seem to be to enable the Official Receiver to bring before the Court matters as to which he has no personal knowledge, and can only be speaking from information and belief. Thus, by the 16th section of the *Debtors Act*, 1869, it is enacted that, "Where a trustee in any bankruptcy reports to any Court exercising jurisdiction in bankruptcy that in his opinion a bankrupt has been guilty of any offence under this Act, or where the Court is satisfied upon the representation of any creditor or member of the committee of

(1) [1892] 3 Ch. 332.

inspection that there is ground to believe that the bankrupt has been guilty of any offence under this Act, the Court shall, if it appears to the Court that there is a reasonable probability that the bankrupt may be convicted, order the trustee to prosecute the bankrupt for such offence." Now, in this section it is impossible to suppose that it was intended that more should be required of the trustee (whose duties in this respect are now performed also by the Official Receiver), as the condition of an order to prosecute, than is required of a creditor making a representation to the Court. It is plain that, in either case, the facts must be stated, because the Court is only to order the prosecution if it appears to the Court that there is a reasonable probability that the bankrupt may be convicted—a matter of which the Court cannot judge unless the facts upon which the application is based are before it. Why, then, does the section require that the trustee or Official Receiver should report that in his opinion a bankrupt has been guilty of an offence under the *Debtors Act*? It seems to be because the Official Receiver is entitled to bring before the Court matters based on information and belief, in which case it is only reasonable that the expression of his belief in a *primâ facie* case of fraud should be made a condition of his obtaining an order for public examination.

It seems to me that sect. 8 of the *Companies* (*Winding-up*) *Act*, 1890, in the same way intends that the Official Receiver should report matters of information and belief, but that when doing so he should pledge himself that such matters in his opinion constitute fraud by some person—not defining which person—falling within the description of persons mentioned in sub-sect. 2 of that section. I do not say that the expression of this opinion is a condition precedent, but I do say that it is convenient in practice that the opinion of the Official Receiver should be so expressed. The opinion so to be expressed, in my judgment, however, as I have already said, is merely an opinion of the Official Receiver that the facts of which he has knowledge, or information which he believes to be true, and which he sets forth in his report, constitute a *primâ facie* case that fraud has been committed in the promotion or formation of the company, or in relation to the company since the formation thereof. Unless,

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therefore, the Official Receiver is prepared to make this or an equivalent statement, I do not think that I ought to make an order. If he is willing to add this statement to each report, I shall then make the order in each case for the public examination; but in the case of the *General Phosphate Corporation* it will, in the first instance, be limited to two of the persons named in the report.

F. E.

The order drawn up in the case of the *General Phosphate Corporation* was as follows:—

The Official Receiver not being willing to state whether in his opinion any fraud has been committed by any person in the promotion or formation or in relation to the said company, or that the facts set forth in his reports constitute a *primâ facie* case that such fraud has been committed, the Judge doth not think fit to make any order upon the application.

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The Official Receiver appealed *ex parte* against the order in the case of the *General Phosphate Corporation*. The appeal was heard on the 31st of October, 1894.

Sir *R. T. Reid*, A.-G., and *Ingle Joyce*, for the Official Receiver:—

This Court has held that an order under sub-sect. 3 of sect. 8, for the public examination of promoters, directors, or officers of a company which has been ordered to be wound up cannot be made unless either the Official Receiver in his further report under sub-sect. 2 states expressly that fraud of the nature specified in that sub-section has been committed, or the facts which are stated in his further report shew plainly that in his opinion such a fraud has been committed: *In re Great Krüger Gold Mining Company* (1); *In re Trust and Investment Corporation of South Africa* (2). In *In re Laxon & Co.* (3), Mr. Justice *Vaughan Williams* interpreted those decisions as meaning that it would be sufficient if the report suggested that a fraud had been committed. This view was afterwards adopted by a divisional Court in *In re Birkdale Steam Laundry and Carpet Beating Company* (4). In the present case the further report of the Official Receiver

(1) [1892] 3 Ch. 307.
(2) Ibid. 332.
(3) [1893] 1 Ch. 210.
(4) [1893] 2 Q. B. 386.

contains no express statement that in his opinion fraud has been committed, and it may be difficult to argue that the facts which he states shew plainly that such is his opinion; but the report contains elements of suspicion which amount to a "suggestion" of fraud, and the Official Receiver says that in his opinion it is desirable that a public examination should be held of the persons whose names he mentions.

LINDLEY, L.J.:—

In my opinion we must refuse this application; in fact we cannot do otherwise if we are to be consistent with our previous decisions. It appears to me now, as it did on the two former occasions, that we construed the Act rightly, and that there is no power to put in force this process of public examination upon a report by the Official Receiver which does not shew upon its face that some fraud has been committed, though not necessarily, as we have carefully explained, by a particular person. There is always great danger in going beyond, or varying, the language of an Act, but, adhering, as I do, to the view that "such report" in sect. 8, sub-sect. 3, means a "further report" and not the preliminary report," it follows that although the Official Receiver need not make a further report, yet if the Court is to order a public examination under this section it must have before it a report such as is referred to in sub-sect. 2, *i.e.* a report stating the manner in which the company was formed and whether in the opinion of the Official Receiver any fraud has been committed by any person in the promotion or formation of the company, or by any of its directors or officers in relation to the company since the formation thereof. In my opinion that is what he ought to state. The exact language in which he is to state it is another matter, and in *In re Trust and Investment Corporation of South Africa* (1) this Court held that the report was sufficient if it shewed fraud. That is, when the fraud was manifest on the face of the report the Court did not think it necessary to send it back to the Official Receiver in order to compel him to say in black and white that, in his opinion, fraud had been committed. That decision has been since interpreted in a way

(1) [1892] 3 Ch. 332.

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which is too lax. We did not intend in any way to depart from the requirement of the Act. But our observations have been understood as meaning that it would be sufficient if in his report the Official Receiver "suggested" fraud. The word "suggest" is very ambiguous. What we meant was, that circumstances must be stated in the report which shew that the Official Receiver is of opinion that some fraud has been committed. If the report shews that, I think it is unnecessary that we should act (so to speak) as drill sergeants, and insist that there should be in the report a paragraph stating in so many words that which is apparent on the face of it. But I think it is time for us to protest against the notion that we went the length of saying that a "suggestion" of fraud would be sufficient.

The result is that, in my opinion, the order of Mr. Justice *Vaughan Williams* is quite right, because this report, even if it does "suggest" fraud, is perfectly consistent with the absence of any fraud, and we cannot from it arrive at the opinion of the Official Receiver that any fraud has been committed. Whether fraud has or has not been committed is not apparent on the face of the report, either in form or in substance. If we are wrong in our construction of the Act the House of Lords must put us right.

A. L. Smith, L.J.:—

I am entirely of the same opinion. I think the pith of Mr. Justice *Vaughan Williams'* judgment is this. He says: "It seems to me that sect. 8 of the *Companies* (*Winding-up*) *Act*, 1890 . . . . intends that the Official Receiver should report matters of information and belief, but that when doing so he should pledge himself that such matters in his opinion constitute fraud by some person—not defining which person—falling within the description of persons mentioned in sub-sect. 2 of that section." It seems to me that that really expresses what this Court has already laid down. I think that the decision of the learned Judge in the present case was right.

Sir *R. T. Reid*, A.-G., asked that, in view of the *Supreme*

Court of Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), leave might (if necessary) be given to appeal to the House of Lords.

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LINDLEY, L.J. :—

We will give you leave, if it is required. The matter is an important one and worthy of the consideration of the highest tribunal.

Solicitor: *Solicitor to Board of Trade.*

W. L. C.

MONTFORTS *v.* MARSDEN.

C. A. 1894 *Nov.* 1.

[1894 M. 8162.]

Agreement that a Third Party shall conduct Defence of Action—Retainer of Solicitor — Appeal to House of Lords — Withdrawal of Retainer — Injunction.

The Defendant in an action for the infringement of a patent for machines agreed with *M.*, from whom he had purchased the machine complained of, that *M.* should have the sole conduct of the defence of the action and that his solicitor should be employed in the proceedings, on giving an indemnity to the Defendant against damages and costs.

A deed of indemnity was accordingly executed and the Defendant gave a retainer to *M.'s* solicitor to act for him "in the defence of the action and any appeals therefrom." The action was tried and an appeal brought to the Court of Appeal, in which the Defendant was defeated. An appeal was then presented in his name to the House of Lords, and a deposit for costs paid; but the Defendant, wishing to stop the proceedings, withdrew his retainer of *M.'s* solicitor, and took steps to withdraw the appeal to the House of Lords :—

Held, that *M.* was entitled to an injunction to restrain the Defendant from breaking his agreement to allow *M.* to conduct the defence, and from withdrawing his retainer of *M.'s* solicitor. But under the circumstances the Court took an undertaking from *M.* to give a further indemnity against extra costs in the House of Lords.

THIS was an appeal from a decision of the Deputy of the Chancellor of the County Palatine of *Lancaster*.

The Plaintiff, *A. Montforts*, was a manufacturer and patentee of weaving machines, carrying on business at *Munchen Gladbach*, in *Germany*. Through his agents at *Manchester*, *Grether & Co.*,

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he sold one of his machines to the Defendant *E. Marsden*. *E. Moser* was also a maker of similar machines, for which he had an English patent; and in November, 1891, he brought an action against *Marsden* for infringing his patent. *Marsden* informed *Montforts* that he should not defend the action unless he was indemnified by him against the costs. *Montforts* applied to the Court to be made a co-Defendant, but was unsuccessful (1). It was, however, eventually agreed that *Montforts* should conduct the defence, and a deed of indemnity was executed on the 6th of April, 1892, by which after reciting, among other things, that *E. Marsden* had agreed to allow *A. Montforts* to use his name and have the sole conduct of the defence of the action on being indemnified in manner thereinafter appearing, *A. Montforts* and *H. Geiler*, representing *Grether & Co.*, jointly and severally covenanted with *E. Marsden* to indemnify him, his heirs, executors, and administrators from all taxed costs and damages in the said action, but *Grether & Co.'s* indemnity was only to extend to £1000; and for the purposes aforesaid, if the solicitor for the said *A. Montforts* should be conducting the defence in the name of the said *E. Marsden*, the said *A. Montforts* and *Grether & Co.* covenanted to supply all moneys in the opinion of *Montforts'* solicitor necessary and proper for the due carrying on of the defence of the proceedings, and to furnish all necessary proofs and evidence, and to indemnify *Marsden* from all liability in respect of any costs, charges, and expenses in the conduct of such defence. And they further covenanted not to pledge the credit of *Marsden* for any costs, charges, or expenses incurred by them in relation to such defence.

Mr. *E. Robinson Walker* was *Montforts'* solicitor, and on the 5th of February, 1892, he was retained by *Marsden* as his solicitor "in the defence of this action, and any appeals therefrom"; it being distinctly understood that his acceptance of such retainer was on the terms of his not charging *Marsden* personally with any costs whatever, or pledging his credit in any way. Mr. *Walker* accepted the retainer on those terms.

The action proceeded in the Palatine Court and was defended by *Montforts* and his solicitor in the name of *Marsden*; and a

(1) See *Moser* v. *Marsden* ([1892] 1 Ch. 487).

judgment was obtained on the 24th of March, 1893, dismissing the action with costs. From this judgment the Plaintiff *Moser* appealed, and the judgment was reversed, and the Defendant *Marsden* ordered to pay the costs of the action.

On the 17th of July, 1894, a petition of appeal was presented in the name of *Marsden* from this judgment, and a deposit of £700 was paid as security for costs of the appeal. All previous costs had been paid. *Marsden*, however, required further indemnity against the costs of the appeal as promoted in the House of Lords, and after considerable correspondence he withdrew his retainer from Mr. *E. R. Walker*, and acting through other solicitors took steps to withdraw the appeal in the House of Lords.

Montforts then issued the writ in the present action, claiming an injunction to restrain *Marsden* from acting in breach of his agreement to permit *Montforts* to have the sole conduct of the defence in the action of *Moser* v. *Marsden* (1), and from withdrawing his retainer from Mr. *E. R. Walker*. The Plaintiff then moved for an injunction in the terms of the writ, which was heard by Mr. *Taylor*, the Deputy of the Chancellor of the Palatine Court, who refused the motion.

The Plaintiff appealed from this order. It was agreed that the hearing of the appeal should be treated as the trial of the action.

Finlay, Q.C., and *Astbury* (*Hopkinson*, Q.C., with them), for the Appellant:—

On the true construction of the agreement the Plaintiff was empowered to conduct the defence in *Moser* v. *Marsden* to the close of the action, and this is made still clearer by the terms of the retainer of Mr. *Walker*, "in this action and any appeals therefrom." If the Court should think that an additional indemnity should be given for the costs in the House of Lords we will undertake to give it.

Oswald, Q.C., and *T. C. Eastwood*, for the Defendant:—

The deed of indemnity only mentions the trial of the action; there is nothing to shew that it was intended to extend beyond

(1) [1892] 1 Ch. 487.

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that. The trial of an action is the right of every suitor; an appeal has been called by a late learned Judge "a luxury." With respect to the retainer of the solicitor, whatever its terms may have been, it was by its very nature revocable. No man can be chained to a solicitor against his will. If the solicitor has any ground for complaint, he may bring his action for damages: *In re Galland* (1); *Rees* v. *Williams* (2); *Emmens* v. *Elderton* (3). At all events, additional indemnity ought to be given if the appeal is to proceed in the House of Lords.

LORD HERSCHELL, L.C.:—

This is an application to restrain Mr. *Marsden*, who was the Defendant in an action brought by a Mr. *Moser* from interfering with the prosecution of an appeal in that action by Mr. *Montforts*. It appears that Mr. *Montforts* is a patentee who had sold one of his patented machines to the Defendant *Marsden*. A claim was made by *Moser* that the machine was an infringement of a patent of his and thereupon he brought an action against *Marsden* for the purpose of restraining the infringement of his patent. *Montforts* was, of course, concerned to defend the validity of his patent and to maintain that the machine which he had sold to *Marsden* was not one which violated any rights of *Moser's*. *Marsden* not unnaturally was not particularly anxious, perhaps not desirous at all, to defend the action. Accordingly, an arrangement was come to between *Montforts* and *Marsden*. No agreement was entered into in writing, though two documents were executed, the one in the form of a retainer to *Montforts'* solicitors by *Marsden*, the other in the form of an indenture containing an indemnity; but these were only instruments employed for the purpose of giving effect to an agreement between *Montforts* and *Marsden*, which is to be implied from the circumstances and from the perusal of those documents. The agreement in its general nature was of a kind perfectly well known. It is a very common thing for a person who is interested in litigation much more than the nominal defendant to arrange that he shall have the conduct of that litigation, that it

(1) 31 Ch. D. 296. (2) Law Rep. 10 Ex. 200.
(3) 4 H. L. C. 624, 629.

shall be really his litigation, although it still has to be conducted in the name of the defendant who is sued. That is the nature of the agreement entered into. It was intended as between *Marsden* and *Montforts* that, although *Marsden* was the person sued, *Montforts* should be the person defending taking charge of and acting really as the litigant, and, as is common in such cases, it was part of the arrangement that the solicitor of the real litigant should be the solicitor who was to conduct the litigation. That was the general nature of the arrangement come to, and its extent and scope are to be gathered from the circumstances and the terms of the documents.

There has been some criticism of the language of the deed of indemnity with a view of shewing that it applied to the action only up to trial, and not to any subsequent appeal. It is not necessary to express an opinion upon it, although I may say that I think, to say the least, that it is open to very great doubt, and the parties, it may be observed, did not act upon that view because it is obvious that the appeal which was brought in the Court of Appeal after the action had been tried was treated by the parties as though it were a matter covered by the deed of indemnity. But when one looks at the terms of the retainer which are in no respect ambiguous, I think it is impossible to doubt that the intention of both parties was that the litigation, not only in the first trial of the action, but in any appeals therefrom, should be conducted by *Montforts*, and that in the conduct of them his solicitor should be employed.

I think the fallacy of Mr. *Oswald's* argument lies in this, that it is not a question of *Marsden* being chained to a particular solicitor in litigation which is being conducted for him; it is a question of his interfering with the real litigant who he has agreed shall conduct the proceedings in his name in the employment of the solicitor whom he wishes to employ.

In the course of the argument, I asked Mr. *Oswald* whether he could contend that if in pursuance of an arrangement of this sort the defence to the action had been commenced by Mr. *Walker* as solicitor for *Montforts* and on his instructions, and it had been prosecuted down to the eve of the trial, then *Marsden* could come in and say, "I withdraw my retainer, Mr. *Walker* shall

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no longer act for me. I will substitute my own solicitors, and they may, pursuant to some arrangement I have made with the plaintiff, give the plaintiff judgment," so rendering the whole of the costs which had been incurred absolutely abortive. Mr. *Oswald* naturally shrunk from maintaining that they could take any such course. But if so, and if in such a case as that, they would not be allowed to set aside *Montforts'* solicitor who had been really acting for him, I am at a loss to see how they can do it at a later stage, seeing that the terms of the retainer apply not only to the defence to the action, but to any appeals therefrom, putting the appeals on precisely the same basis as the defence to the action, and rendering it, as it seems to me, as impossible to contend that they have a right to intervene in the way they are contending for at the later stage as it would have been at the point of time I put, namely, immediately before the trial of the action.

No doubt if the Defendant had been in peril, if the prior costs had not been paid, if there were some reason to doubt whether he would not be left liable to loss in a litigation, that was not really his but another's, the Court would have been very unwilling to interfere to bring about such a result. It might even then be doubtful whether the answer to any such objection would not have been, "Before entering into the agreement into which you did enter, you should have taken care that the indemnity which you obtained was sufficient to satisfy you throughout, and in all events. If you have not done so it may be your misfortune, but you cannot now insist upon intervening." But it is not necessary to consider that question because the case now stands in this way. £700 has been deposited in the House of Lords to answer the costs of the appeal. It is suggested that that may not be sufficient. It is suggested also that the indemnity provided for by the indenture would not cover any extra costs in the House of Lords, but all those difficulties are really got rid of by the undertaking which has now been given.

I think that the order should be prefaced by a statement that £700 has been deposited in the House of Lords, and that *Montforts* and *Geiler* undertake that the indemnity provided for by the

indenture of the 6th of April, 1892, shall apply to any costs of the appeal not covered by the £700 deposited; and on that undertaking restrain the Defendant from taking any step in or in relation to the action or any appeal therein by himself or by any solicitor other than *E. R. Walker*, and from interfering with the prosecution of any such appeal by *Montforts* in the name of the Defendant.

I think that under the circumstances there should be no costs of these proceedings.

LINDLEY, L.J.:—

I am of the same opinion. Mr. *Oswald* has said and said truly that this is an unprecedented application. I certainly do not recollect any application of the kind, but the reason that it is unprecedented is that the circumstances have never arisen before.

There is a patent action of *Moser* v. *Marsden* (1), in which *Marsden* has been beaten. The real person interested in that patent action was not *Marsden* but *Montforts*, and *Montforts* is desirous, and has been always desirous, of defending the action. He defended the action, and there was an appeal to this Court, and now he wants to appeal to the House of Lords. It is an action in substance against him, and the defence is his; and there was an agreement, the whole terms of which are not in writing; but there was an agreement clearly to be inferred from the retainer and the indemnity deed that *Montforts* should be at liberty to use *Marsden's* name, and should indemnify him against the costs up to a certain point. That has been carried out loyally. Then there is an appeal to the House of Lords, and *Marsden*, for some reason or other, takes the view that the proceedings shall be stopped. I think it is only throwing dust into our eyes to say that all he wants is to get further security. The £700 deposited as security for the costs of the appeal as long ago as July are sufficient, and if £700 had not been enough we should have had some affidavit to say so or some application to increase it. But it seems to me that it is obvious from what took place

(1) [1892] 1 Ch. 487.

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in the Court below, and what has taken place here for some reason or other which it is quite unnecessary to go into, *Marsden* has changed his mind and does not want to go on with the appeal to the House of Lords, and intends to stop it if he can. That is a gross breach of faith in my opinion towards *Montforts* and ought to be stopped, and inasmuch as the circumstances are unprecedented, the order will be unprecedented.

I think the parties are quite right in treating this as an appeal from the judgment on the trial of the action, and that there is no necessity to have the case fought over again, and this I think ought to be stated in the order. Then, with the undertaking which the Lord Chancellor has referred to, I think the injunction should go.

A. L. SMITH, L.J.:—

The Lord Chancellor and Lord Justice *Lindley* have entirely covered the ground, and I have really nothing to add except that I agree.

Solicitors: *Jaques & Co.*, agents for *E. Robinson Walker & Co., Manchester; Norris, Allens & Chapman,* agents for *Diggles & Ogden, Manchester.*

M. W.

C. A.
1894
CHITTY, J.
May 23;
June 12.
C. A.
Nov. 5, 6.

In re RYMER.
RYMER *v.* STANFIELD.

[1894 R. 151.]

Will—Legacy—Charity—Charitable Intention—Failure of Particular Object in Testator's Lifetime—Lapse—Cy-près.

A testator bequeathed a legacy of £5000 "to the rector for the time being of *St. Thomas' Seminary* for the education of priests in the diocese of *Westminster* for the purposes of such seminary." At the date of the will *St. Thomas' Seminary* was carried on at *Hammersmith*; but shortly before the testator's death the seminary ceased to exist, and the students who were being educated there were removed to another seminary near *Birmingham*.

Held (affirming the decision of *Chitty*, J.), that the bequest was for the benefit of the particular institution, and, that institution having ceased to exist in the testator's lifetime, the legacy could not be applied *cy-près*, but lapsed and fell into the residue.

Clark v. *Taylor* (1) and *Fisk* v. *Attorney-General* (2) followed.

HORATIO RYMER by his will, dated the 2nd of August, 1883, after bequeathing divers specific and pecuniary legacies, devised and bequeathed all his estate to the Plaintiffs upon trust to pay his funeral and testamentary expenses, and to pay and appropriate the legacies thereinbefore and thereinafter given, and he directed that his trustees should stand possessed of divers legacies which were settled as therein mentioned, and declared that all duty payable to Government on any legacies thereinbefore given should be paid out of the residue of his estate. The will then proceeded as follows: "Subject to and after payment and satisfaction of the before-mentioned legacies and the duties thereon, I give the following charitable legacies to the following institutions and persons respectively, all subject to legacy duties, that is to say, to the rector for the time being of *St. Thomas' Seminary* for the education of priests in the diocese of *Westminster* for the purposes of such seminary £5000; and I direct that the said rector shall at his discretion make a settlement thereof by deed in the names of proper trustees so as to

(1) 1 Drew. 642. (2) Law Rep. 4 Eq. 521.

C. A. 1894 *In re* RYMER. RYMER *v.* STANFIELD.

make the same a permanent fund. And I direct that the candidates to be educated out of the income of this bequest shall be nominated from time to time by the rector for the time being of such seminary. And I request, but not as a condition to this bequest, that a yearly mass for the repose of my soul may be said at the said seminary in perpetuity, and that a yearly mass for the same object may be said during life by each of the priests who may have been educated wholly or on part in this foundation." The testator then gave a legacy of £2000 to Cardinal *Manning* or the Archbishop of *Westminster* for the time being, to be applied for the purposes of the *Westminster* Diocesan Education Fund at discretion, and bequeathed other charitable legacies to a large amount, some of £2000 and some of £1000, and in each case he gave the legacy to the manager of the charity "for the purposes of such charity." And he directed that the aforesaid charitable legacies should be paid exclusively out of such part of his personal estate as by law could be given by will for charitable purposes, but that his estate should be so marshalled and applied that in case of a deficiency of assets the legacies, not being charitable, should be paid in priority to those which were charitable, and he directed that the residue of his estate should be held by his trustees upon the trusts therein declared concerning the same, and appointed the Plaintiffs executors of his will.

The testator executed two codicils, dated respectively the 14th of April, 1890, and the 10th of May, 1893, neither of which affected the bequests contained in the will. The testator died on the 5th of June, 1893. At the date of the will the institution called *St. Thomas' Seminary* was in existence. The seminary was established in or about the year 1869 at *Hammersmith*, for the education of priests for the diocese of *Westminster*, and was carried on without break from the time of its establishment until the month of March, 1893, and had a complete staff of professors and teachers. It was supported partly by the payments made by or on behalf of the students, and partly by the income of funds belonging to the diocese of *Westminster* and applicable for the purpose.

Cardinal *Manning* predeceased the testator; and at the

testator's death the Defendant, Cardinal *Vaughan*, was Archbishop of *Westminster*.

Prior to the death of Cardinal *Manning* it had been found that the expenses of carrying on the seminary at *Hammersmith* were heavier than the resources available could discharge, and shortly before Lady Day, 1893, such of the students as were ready for ordination were ordained, and the rest of the students were removed to *Oscott*, near *Birmingham*, where a seminary had been established by the Bishop of *Birmingham*, and was carried on by the bishop as president, for the education of priests for *Westminster*, *Birmingham*, and some of the other dioceses in *England*.

This was a summons taken out by the executors of the will for the opinion of the Court, whether under the circumstances the legacy of £5000 to the rector for the time being of *St. Thomas' Seminary* had lapsed and fallen into the residuary estate of the testator; and if the Court should be of opinion that the legacy had not lapsed, then how the same should be dealt with or disposed of. The summons came on to be heard before Mr. Justice *Chitty* on the 23rd of May, 1894.

Levett, Q.C., and *T. L. Wilkinson*, for the Plaintiffs:—

The gift was to benefit the particular seminary for priests at *Hammersmith*; it is a clear gift to the rector for the time being for the purposes of that particular seminary. The testator intended to endow that particular seminary with £5000. It is not a gift for charities at large, but for a particular institution; and that institution having ceased to exist during the lifetime of the testator, the legacy has lapsed: *In re Ovey* (1); *Fisk* v. *Attorney-General* (2); *In re Slevin* (3).

Byrne, Q.C., and *P. F. S. Stokes*, for Cardinal *Vaughan*:—

We claim this legacy as being a gift to a trustee for purposes which still exist, namely, the education of priests for *Westminster*, *Birmingham*, and elsewhere. In *In re Ovey* the gift was to a particular institution; and, that particular institution having

(1) 29 Ch. D. 560. (2) Law Rep. 4 Eq. 521.
(3) [1891] 2 Ch. 236.

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ceased to exist, the gift was held to have lapsed. Here the gift is to the rector for the time being for educational purposes, and the Court will not allow the gift to fail because there is no trustee to take it. The educational purposes exist though the particular seminary has ceased to exist.

Ingle Joyce (Sir *J. Rigby*, A.-G., with him), for the Attorney-General:—

There is a sufficient general intention of charity to be gathered from the will to entitle the Court to execute this trust *cy-près*, and to direct a scheme for that purpose to be settled. There is a general intention to benefit students preparing themselves to become priests, and if the particular mode which the testator has directed has failed, it does not follow that the gift has entirely failed, and that the legacy belongs to the next of kin. If there is a general intention of benefiting a certain class of people, and the particular mode contemplated by the testator has failed, the Court, favouring charity as it has always done, will provide a mode other than that which the testator has pointed out: *Biscoe* v. *Jackson* (1). *In re Ovey* (2) and *Fisk* v. *Attorney-General* (3) are in direct conflict with the earlier authorities. In *Marsh* v. *Attorney-General* (4) it was held that a bequest to the president and trustees of a school, to be applied in instructing youth in specified subjects, did not fail by reason of the school having been closed before the testator's death or the date of his will, and a scheme was directed. In *In re Clergy Society* (5), where the object of the gift was not sufficiently defined, a scheme was directed. In *Loscombe* v. *Wintringham* (6), a bequest to the governors of a society instituted for the "increase and encouragement of good servants," and no such institution could be found, was held to be charitable and did not fail. *In re Maguire* (7) is also a decision in our favour. In that case there was a gift to the "*Church Pastoral Aid Society* in *Ireland*." There was no such society in *Ireland*, but there was a

(1) 35 Ch. D. 460.
(2) 29 Ch. D. 560.
(3) Law Rep. 4 Eq. 521.
(4) 2 J. & H. 61.
(5) 2 K. & J. 615.
(6) 13 Beav. 87.
(7) Law Rep. 9 Eq. 632.

society called the *Spiritual Aid Society*; and Vice-Chancellor *James* made an order for payment of the legacy to that society, as it was clear the testatrix intended to benefit a particular object of charity, namely, pastoral aid in *Ireland*. We therefore submit that the Court ought to hold that in this case the legacy has not lapsed and ought to direct a scheme.

Levett, in reply:—

None of the cases cited for the Attorney-General conflict with *In re Ovey* (1) and *Fisk* v. *Attorney-General* (2); they are all distinguishable.

1894. June 12. CHITTY, J.:—

The substantial questions are whether the legacy of £5000 bequeathed to the rector for the time being of *St. Thomas' Seminary* has lapsed and fallen into the residuary estate, or whether it ought to be applied *cy-près*. The point taken at the Bar, that there was a mere failure of the trustee, and that nothing was required except that the Court should appoint a new trustee in the place of the rector, cannot be maintained, and it is not necessary to discuss it. [His Lordship, having stated the facts as above set out, proceeded:—]

It cannot be properly said, and it was not argued before me, that the *St. Thomas'* institution migrated to *Oscott*, or that the only change which took place was a change in the local habitation of *St. Thomas'* institution, or that it was being carried on under a change of name only. The legacy was not claimed on behalf of *Oscott* as the successor of *St. Thomas' Seminary* or otherwise. It is a different institution, although one of its purposes was the same as that of *St. Thomas' Seminary*. In the result, I find as a fact that *St. Thomas' Seminary*, which existed in 1883, when the testator made his will, had ceased to exist at his death.

The legacy is bequeathed in these terms. [His Lordship read the bequest as above set out, and proceeded:—] This was followed by a legacy to the Archbishop of *Westminster* for the purposes of the *Westminster* Diocesan Education Fund, and by other charitable legacies.

(1) 29 Ch. D. 560. (2) Law Rep. 4 Eq. 521.

C. A. 1894 *In re* RYMER. RYMER v. STANFIELD. Chitty, J.

On the construction of this gift I hold that it is a gift to a particular charitable institution for the purposes of the institution. It was argued that the words "for the education of priests in the diocese of *Westminster*" shew a general charitable intention for the education of priests for that diocese unconnected with *St. Thomas'*. But those words are, I think, merely descriptive of the particular institution, which was in fact a seminary for the education of such priests, and that the words are governed by what follows, namely, "for the purposes of such seminary." The rector, under the discretionary power conferred on him to make a settlement of the legacy in the names of the trustees so as to make a permanent fund, could not have directed the income to have been applied otherwise than for the purposes of the seminary. The direction that the candidates should be nominated by the rector of the seminary, and the request that yearly masses should be said "at the said seminary," and the reference to "this foundation" at the end of the gift, all tend to confirm the opinion that the benefit of the gift was confined to this particular institution.

Now, the rule established by *Fisk* v. *Attorney-General* (1) is, that where a legacy is bequeathed to a particular charitable institution existing at the date of the will, and the institution has ceased to exist before the testator's death, the legacy fails, and lapses in the same way as in the case of an individual. Counsel for the Attorney-General appeared to express some dissatisfaction with that authority. No doubt the Vice-Chancellor in his judgment stated that he was far from saying that the question might not some day or other require further consideration; but the decision, which was founded on what the Vice-Chancellor considered to be settled authorities, was pronounced in 1867, more than a quarter of a century ago, and so far from its having been subsequently overruled by or dissented from in any subsequent case, it was followed in 1885 in *In re Ovey* (2), and, as I read the observations and judgments in *In re Slevin* (3), it has been recently approved by the Court of Appeal. I have no alternative but to treat it as a binding authority. It

(1) Law Rep. 4 Eq. 521. (2) 29 Ch. D. 560.
(3) [1891] 2 Ch. 236.

is, I think, right in principle. Charity, no doubt, has been favoured by Equity. It has been excepted from the rule against perpetuity, and it has been allowed the benefit of the *cy-près* doctrine. *Fisk* v. *Attorney-General* (1) places what seems to me to be a reasonable limitation on that doctrine. Many a testator has made a bequest in favour of a particular charity because he has been personally connected with it, because he approves of its system of management or for other special reasons, who would not have been minded to make any other similar charitable institution the object of his bounty.

The cases cited for the Attorney-General are consistent with *Fisk* v. *Attorney-General* and distinguishable. No doubt in a bequest where a particular charity appears to be or is named, a general charitable intent or an intent extending beyond the limits of the particular institution may be discoverable sufficient to justify the application of the *cy-près* doctrine. In *Loscombe* v. *Wintringham* (2) the bequest was to the governors of a society instituted for the increase and encouragement of good servants. No such society could be found. From this it was not difficult to infer that the testator had no particular institution in mind, and that his intention was generally the increase and encouragement of good servants.

In re Clergy Society (3) was to the like effect. The gifts were made to the "following" societies established or carried on in *London*, and amongst those enumerated was the "*Clergy Society*." There being no society answering that description, a scheme *cy-près* was directed. In neither of these cases was there any institution shewn to be in existence at the date of the will.

In *Marsh* v. *Attorney-General* (4) the bequest was to the Trustees and President of the *Deal Nautical School* in trust to be invested in public funds and the yearly interest to be applied for the instruction of youth in the practical part of navigation and nautical astronomy. The *Deal Nautical School* was discontinued for want of funds several months before the date of the testator's will. Consequently, there was no such institution in existence

(1) Law Rep. 4 Eq. 521.
(2) 13 Beav. 87.
(3) 2 K. & J. 615.
(4) 2 J. & H. 61.

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when the will was made; and further, the gift was not confined to the purposes of the particular school, but was generally for the instruction of youth in the subjects mentioned; if the school had continued to exist, the trustees and president might properly have applied the income for instruction outside the school. These three cases of *In re Clergy Society* (1), *Marsh* v. *Attorney-General* (2), and *Fisk* v. *Attorney-General* (3), were all decided by Vice-Chancellor *Wood*.

In re Maguire (4), before Vice-Chancellor *James*, was, as I read the judgment, rather a case of misdescription of the particular charitable institution intended; if not, it was a case of a gift to an institution which did not exist at the date of the will, and from this circumstance an intention to devote the money to a particular object of charity, such as pastoral aid in *Ireland*, was readily gathered. The Vice-Chancellor referred in his judgment to *Fisk* v. *Attorney-General*, and expressed no dissent from that case.

In the case before me, I am unable to extract any general or particular intention of charity for the education of priests in the diocese of *Westminster* unconnected with or severable from *St. Thomas' Seminary*. The case appears to be in principle undistinguishable from *Fisk* v. *Attorney-General*.

A point was suggested but not argued, and, as I understood, abandoned, turning on the codicil executed by the testator on the 10th of May, 1893. It is sufficient to say that a codicil, whether purporting to confirm the will or not, does not revive a legacy already lapsed by the death of the legatee. Nor does the codicil afford any ground for letting in the application of the *cy-près* doctrine. There was no evidence to shew that the testator was aware on the 10th of May, 1893, that the seminary had ceased to exist.

For these reasons, I hold that the legacy has lapsed and fallen into the residue.

G. M.

C. A. From this decision the Attorney-General appealed. The appeal came on to be heard on the 5th of November, 1894.

(1) 2 K. & J. 615.
(2) 2 J. & H. 61.
(3) Law Rep. 4 Eq. 521.
(4) Ibid. 9 Eq. 632.

Cozens-Hardy, Q.C., and *Ingle Joyce* (Sir *R. T. Reid*, A.-G., with them), for the Appellant, contended, as in the Court below, that there was a sufficient intention to dedicate the gift to charity to be gathered from the will to justify the Court in executing the trust *cy-près* and in directing a scheme for the purpose to be settled. They cited *Moggridge* v. *Thackwell* (1); *Mills* v. *Farmer* (2); *Loscombe* v. *Wintringham* (3); *In re Clergy Society* (4); *Marsh* v. *Attorney-General* (5); *In re Maguire* (6): *Biscoe* v. *Jackson* (7) and *De Costa* v. *De Paz* (8); and distinguished *Clark* v. *Taylor* (9), *Russell* v. *Kellett* (10), *Fisk* v. *Attorney-General* (11), *In re Ovey* (12), and *In re Slevin* (13).

Byrne, Q.C., and *P. F. S. Stokes*, for Cardinal Vaughan, and

Levett, Q.C., and *T. L. Wilkinson*, for the Plaintiffs, were not called on.

LORD HERSCHELL, L.C.:—

In spite of the able argument which has been addressed to us by the learned counsel for the Appellant, I entertain no doubt that the judgment of Mr. Justice *Chitty* was right.

The first step to be taken is to construe the will of the testator. By his will, after providing for payment of certain legacies, he proceeds thus: [His Lordship read the bequest to the rector of *St. Thomas' Seminary* set forth above, and continued:—]

That bequest is followed by a number of other bequests: legacies of £2000 each are given to certain persons for school and orphanage purposes, the bequests in each case being described as given for the purposes of that particular institution. Then follow legacies to representatives of institutions having some of the same objects precisely as the previous gifts, each

(1) 7 Ves. 36.
(2) 1 Mer. 55.
(3) 13 Beav. 87.
(4) 2 K. & J. 615.
(5) 2 J. & H. 61.
(6) Law Rep. 9 Eq. 632.
(7) 35 Ch. D. 460.
(8) 2 Swans. 487, n.
(9) 1 Drew. 642.
(10) 3 Sm. & Giff. 264.
(11) Law Rep. 4 Eq. 521.
(12) 29 Ch. D. 560.
(13) [1891] 2 Ch. 236.

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legacy being limited in the case of these particular institutions to £1000. The contention on behalf of the Appellant is that from the gift now in question is to be inferred an intention on the part of the testator to benefit priests by educating them quite apart from their education taking place in or in connection with this particular seminary; that it is quite immaterial that he has designated that particular seminary; and that the gift can be regarded as a charitable one that must take effect even though that seminary should have ceased to exist at the time of the death of the testator. I am unable so to construe this bequest. I think in all these cases (and they may all be looked at for the purpose of throwing light on this bequest) the testator had in view particular institutions, and although their objects may be the same, he graduates his bounty towards them, shewing, for instance, that it was the education of the orphans at this or that institution which he had in his mind, and not merely the education of orphans, if I may say so, at large. In the first place I observe that he says: "I give the following charitable legacies to the following institutions and persons"—the persons are named in connection with the institutions. There is no person named except in connection with an institution, and therefore he indicates at the outset that the legacy is to be a legacy to the institution, although he names the officer of the institution who is to take it. It seems to me, therefore, that we start with that indication. Then he mentions *St. Thomas' Seminary*, it is true, in conjunction with the words "for the education of priests in the diocese of *Westminster*." It is said that those are his words and not part of the title of the institution; but it would be obviously a piece of prudence to insert those words in order to make sure that the bequest should go to the *St. Thomas' Seminary* which he had in view, not to any *St. Thomas' Seminary* which might possibly have existed not having that object and being a different institution. But the gift is to be for the purposes of such seminary, and then it is to be observed that, although he does not make it a condition of the gift, he does couple it with the request that a yearly mass for the repose of his soul may be said at the said seminary. The whole is localised and connected

with that institution as distinctly, as it seems to me, as a bequest could be. That is the construction which I put upon the language which the testator has used.

Now, there did exist such an institution answering in every respect the description given. That institution was no longer in existence at the time of the death of the testator. The Appellant contends that under those circumstances, and on the *cy-près* doctrine, the gift ought still to be treated as charitable, and to be applied to some cognate purpose. In support of this, when once the construction has been arrived at which I have put upon the will, I have been unable to find that they have cited a single authority in point. They placed reliance upon the decision of Lord *Eldon* in *Moggridge* v. *Thackwell* (1) and *Mills* v. *Farmer* (2). The nature of those cases, and the effect of the decision, I think, is very well emphasised in a short passage in Lord *Eldon's* judgment in the latter case. He points out that giving property "to such person as I shall name to be my executor," and appointing no executor, leaves that in the case of an individual a void gift. And then he says (3): "But, to give effect to a bequest in favour of charity, the Court will . . . . supply the place of an executor and carry into effect that which, in the case of individuals, must have failed altogether. This distinction has proceeded partly, perhaps, on principles in the Roman law which we do not at this time perfectly comprehend; and partly, no doubt, on the religious notions which formerly obtained in this country, according to which it fell to the Ordinary's province to distribute, in case of intestacy. A third principle, which it is now too late to call in question, is, that in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this Court, which will then supply the mode which alone was left deficient." That is the principle in *Moggridge* v. *Thackwell* and in *Mills* v. *Farmer*, and of course would cover a considerable class of cases. The testator has defined the general

(1) 7 Ves. 36. (2) 1 Mer. 55.

(3) 1 Mer. 94.

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character of the charity which he has in view, but has left the objects to be specified by a particular individual who can no longer specify them. That is one illustration of it; but of course many might be given, all coming within the language to which I have referred.

Then reference is made to another class of case, such as *De Costa* v. *De Paz* (1), where there was a gift for a charitable purpose which the Court held to be illegal, and to which, therefore, it could not give effect; and in those cases, seeing that there was a charitable purpose, but it being one which the Court could not give effect to, the Courts have applied the money, so designed in their view for charity, in some charitable fashion other than that illegitimate method designated by the testator. Of course that is a class of case which we need not further discuss in connection with the one now before the Court.

But then follow a series of cases of another description, although coming within the same principle, it may be said, as *Moggridge* v. *Thackwell* (2) and *Mills* v. *Farmer* (3). The first of those is *Loscombe* v. *Wintringham* (4), where a bequest of £500 was given for a society for the encouragement of servants in good conduct. No such society was known to exist, and we may take it none did exist. The Court there said there was a charitable purpose; the machinery for carrying it into effect, the channel through which it should be carried into effect, has not been designated by the testator, but nevertheless the Court will carry it into effect. That was also the position in the case of *In re Clergy Society* (5), which was a society named, but which might as well have been left unnamed because there was no such society existing. The same was the case in *In re Maguire* (6), where a Church Pastoral Aid Society in *Ireland* was mentioned, which was also a non-existing society. Those cases also form a class which has been established upon the same principles and considerations as I think guided the Court in *Moggridge* v. *Thackwell* and *Mills* v. *Farmer*, and that class of case; but they do not seem to me to govern the present case when

(1) 2 Swans. 487, n.
(2) 7 Ves. 36.
(3) 1 Mer. 55.
(4) 13 Beav. 87.
(5) 2 K. & J. 615.
(6) Law Rep. 9 Eq. 632.

once the construction has been put upon the will which I have put on the will of this testator.

One other case I may allude to in connection with the class of cases beginning with *Loscombe* v. *Wintringham* (1), which I have mentioned, and that is the case of *Biscoe* v. *Jackson* (2). It seems to me that Lord Justice *Cotton* and Lord Justice *Lindley* in delivering their judgment in that case, so far from using language favouring the argument of the present appellant, seemed to assume the case against the appellant upon the construction which I have put upon the will, but decided in favour of the bequest there on the ground that it was not a bequest to any particular institution, but a bequest for a purpose which, if it could not be carried out precisely in the way named, must be carried out as nearly as possible.

Now I come to another class of cases within which I think the present case falls. The first of those is *Clark* v. *Taylor* (3), where reliance was placed upon *Loscombe* v. *Wintringham*; but the Vice-Chancellor declined to decide the case in the same way as *Loscombe* v. *Wintringham* had been decided, because he regarded that case as distinguishable. He did not intend to impugn that case, as he said, in the slightest degree, but he regarded it as not governing the case then before him. The language which he uses (and there have been few Judges more careful in their use of language or more accurate than he was) is this (4): "There is a distinction well settled by the authorities. There is one class of cases, in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class, in which the testator shews an intention, not of general charity, but to give to some particular institution; and then if it fails, because there is no such institution, the gift does not go to charity generally; that distinction is clearly recognised; and it cannot be said that wherever a gift for any charitable purpose fails, it is nevertheless to go to charity. In many cases, it is difficult to see to which

(1) 13 Beav. 87.
(2) 35 Ch. D. 460.
(3) 1 Drew. 642.
(4) Ibid. 644.

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particular class the case is to be referred, and this is, to a certain extent, one of such cases." Now, there the Vice-Chancellor lays down the distinction in the clearest terms. It is said that in that case the facts shew that the institution had not ceased to exist till after the death of the testator, that, therefore, the decision of the Vice-Chancellor must be read as referable to such a case, and if so his decision has been overruled. I cannot think that any such point was raised in that case. It is true that on the statement of facts it would seem to have arisen; but then the statement of facts is now shewn to be inaccurate. The report states that the testator died in October, 1840, and an examination of the record has shewn that the testator did not die till October, 1846. It is true that *Drewry's* report states that the institution came to an end in November, 1846, which would have shewn that it survived the testator by a month or part of a month. But it is just as likely that there has been some mistake in the date of the cessation of the institution as in the date of the death of the testator—at all events, it is to me inconceivable that if such a point existed, and it could have have been argued in that case, that Mr. *Wickens*, who argued for the Crown, should not have made the point, and that there should be no allusion to it whatsoever in the judgment of the Vice-Chancellor. I therefore cannot regard the judgment of the Vice-Chancellor *Kindersley* in *Clark* v. *Taylor* (1) as otherwise than a decision upon the point which it purports to decide, that having no relation to the fact that the institution had survived the testator. That clearly was the view taken by Vice-Chancellor *Wood* in *Fisk* v. *Attorney-General* (2). He had there a similar point before him. The institution was the *Ladies' Benevolent Society* at *Liverpool*, and the institution had come to an end before the death of the testator. The Vice-Chancellor followed *Clark* v. *Taylor*, and held that, it having so come to an end, the gift failed altogether.

I pass by *Russell* v. *Kellett* (3), because on the facts of the case there may be some discussion as to how far the principle was properly applied; but the same principle was recognised by Vice-

(1) 1 Drew. 642. (2) Law Rep. 4 Eq. 521.
(3) 3 Sm. & Giff. 264.

Chancellor *Stuart* in that case. It was afterwards recognised and followed in the case of *In re Ovey* (1) by Mr. Justice *Pearson*, and it seems to me that in the case of *In re Slevin* (2) in this Court not the slightest dissent was expressed from the view of Vice-Chancellor *Kindersley*, but rather the contrary. In delivering the judgment of the Court, Lord Justice *Kay* says (3): "In the present case we think that the Attorney-General must succeed, not on the ground that there is a general charitable intention that the fund should be administered *cy-près* even if the charity had failed in the testator's lifetime, but because, as the charity existed at the testator's death, this legacy became the property of that charity, and on it ceasing to exist its property falls to be administered by the Crown." So that, so far from throwing any doubt upon *Clark* v. *Taylor* (4), it seems to me to recognise the distinction and decides the case, not on any ground inconsistent with *Clark* v. *Taylor*, but exclusively on the ground that the charity having survived the testator the bequest had taken effect, and when the charity ceased to exist its property fell to the administrator of the Crown.

One case was referred to which was said to be somewhat an exception to those with which I have been dealing—the case of *Marsh* v. *Attorney-General* (5)—and at first sight it appeared to be so. It was a gift to the President of the Nautical School at *Deal*, and the Nautical School at *Deal* was not in existence at the time of the death of the testator. But, rightly or wrongly, it is quite immaterial to inquire, the Court there came to the conclusion on the true construction of the will that the money was given to the president of that school, not for the benefit of the school but that education might be given to certain boys; and it was said that the trust would have been perfectly discharged by educating the boys at *Oxford* and *Cambridge*, or elsewhere than at the school. It therefore really forms no exception in view of the construction put on that will to the cases to which I have been alluding.

I think I have now referred to every one of the cases which

(1) 29 Ch. D. 560.
(2) [1891] 2 Ch. 236.
(3) [1891] 2 Ch. 243.
(4) 1 Drew. 642.
(5) 2 J. & H. 615.

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have been relied on by the learned counsel for the Appellant, and they seem to me to lead to the conclusion that this case does come within the class of cases, the first of which is *Clark* v. *Taylor* (1), decided forty years ago, but which has been followed often since, and that there is really no authority in any way conflicting with that series of decisions. Certainly on principle they seem to me to be sound; and I do not think it would be in accordance with sound principle to hold or that any prior decisions necessitate our holding, where the conclusion is once arrived at that the main object of the testator or testatrix was to benefit a particular institution, that that was not of the essence of the bequest and that if that institution has ceased to exist the charitable legacy ought still to be held as effectual, and the money to be applied by the Court on the *cy-près* principle.

For these reasons, I think the appeal should be dismissed with costs.

LINDLEY, L.J.:—

I think the result at which Mr. Justice *Chitty* has arrived is right. I have attended to and followed the arguments both of Mr. *Cozens-Hardy* and of Mr. *Ingle Joyce*, and in a great many of those arguments I concur. I think, with Mr. *Joyce*, that it does not do to approach a will of this kind by a short cut by saying there is a lapse, and there is an end of it. It is begging the question whether there is a lapse or not. You must construe the will and see what the real object of the language which you have to interpret is. I will not read the words of this gift again; I have read them very often, and studied them with care. I cannot arrive at the conclusion at which the Appellant's counsel ask me to arrive, that this is in substance and in truth a bequest of £5000 for the education of the priests in the diocese of *Westminster*. I do not think it is. It is a gift of £5000 to a particular seminary for the purposes thereof, and I do not think it is possible to get out of that. I think the context shews it. I refer to the masses, the choice of candidates, and so on. If once you get thus far the question arises, Does that seminary

(1) 1 Drew. 642.

exist? The answer is, It does not. Then you arrive at the result that there is a lapse; and if there is a lapse, is there anything in the doctrine of *cy-près* to prevent the ordinary doctrine of lapse from applying? I think not. Once you arrive at the conclusion that there is a lapse, then all the authorities which are of any value shew that the residuary legatee takes the lapsed gift. We are asked to overrule that doctrine, laid down by Vice-Chancellor *Kindersley* in *Clark* v. *Taylor* (1) and followed in *Fisk* v. *Attorney-General* (2). I think that the doctrine is perfectly right. There may be a difficulty in arriving at the conclusion that there is a lapse. But when once you arrive at the conclusion that a gift to a particular seminary or institution, or whatever you may call it, is "for the purposes thereof," and for no other purpose—if you once get to that, and it is proved that that institution or seminary, or whatever it is, has ceased to exist in the lifetime of the testator, you are driven to arrive at the conclusion that there is a lapse, and then the doctrine of *cy-près* is inapplicable.' That is in accordance with the law, and in accordance with all the cases that can be cited. I quite agree that in coming to that conclusion you have to consider whether the mode of attaining the object is only machinery, or whether the mode is not the substance of the gift. Here it appears to me the gift to the seminary is the substance of the whole thing. It is the object of the testator. I think that is plain from the language used.

Those are the short grounds of my judgment. I do not comment upon the decisions, because the Lord Chancellor has done that sufficiently.

A. L. SMITH, L.J.:—

I have nothing material to add. In investigating whether Mr. Justice *Chitty's* judgment is correct, the first point we must make up our minds upon is this—whether he is right upon the construction he puts upon this bequest, which is, that it is a gift to a particular institution for the purposes of that institution. That is the construction which he has placed on the bequest which is now under consideration. The Lord Chancellor

(1) 1 Drew. 642. (2) Law Rep. 4 Eq. 521.

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and Lord Justice *Lindley* have dealt with the considerations as to whether that is correct or not. I entirely agree with what has been said by them. In my opinion, this is a bequest to a particular institution, for the purpose of that institution, and it is not correct to say that it is a bequest to concrete priests generally in *Westminster*. When once this is arrived at, the cases cited by Mr. *Cozens-Hardy* and Mr. *Ingle Joyce* seem to me to be all one way. They begin with the judgment of Vice-Chancellor *Kindersley* in *Clark* v. *Taylor* (1), as explained by the Lord Chancellor, followed by Vice-Chancellor *Wood* in *Fisk* v. *Attorney-General* (2), and then by Mr. Justice *Pearson* in *In re Ovey* (3). I am not saying that *In re Ovey* is a decision, but one sees how he deals with the law relating to *cy-près* upon a bequest like this; then comes the case of *Biscoe* v. *Jackson* (4), where Lord Justice *Cotton* and Lord Justice *Lindley* also deal with the principles of the law; and it seems to me from *Clark* v. *Taylor* down to that case the authorities are all in sequence upon this point.

I am therefore of opinion that Mr. Justice *Chitty* being right in the construction he put on the bequest and being also right as to the law, this appeal must be dismissed.

Solicitors: *Frank Richardson & Sadler; Witham, Lambert & Roskell; Hare & Co.*

(1) 1 Drew. 642.
(2) Law Rep. 4 Eq. 521.
(3) 29 Ch. D. 560.
(4) 35 Ch. D. 460.

M. W.

In re SOUTH AMERICAN AND MEXICAN COMPANY. *Ex parte* BANK OF ENGLAND.

C. A.
1894
VAUGHAN WILLIAMS, J.
July 19, 20.
C. A.
Nov. 6.

[00214 of 1893.]

Estoppel—Judgment by Consent—Action for Instalment under Agreement—Denial of Agreement—Effect of Judgment as to establishing Agreement—Company—Winding-up—Proof of Debt.

A judgment by consent, or default, is as effective as an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case.

An action was brought against a company to recover an instalment of a debt alleged to be due under an agreement, the existence of which was denied by the company:—

Held (affirming the decision of *Vaughan Williams*, J.), that judgment by consent for the Plaintiffs precluded the liquidator in the winding-up of the company from denying the existence of the agreement on a proof being sent in for the total amount due under the agreement.

Jenkins v. *Robertson* (1) distinguished.

In 1891 *C. de Murrieta & Co.* owed the *Bank of England* £514,300. From September, 1891, to February, 1892, negotiations took place which, as alleged by the Bank, resulted in an agreement between the Bank and the *South American and Mexican Company, Limited*, by which the company agreed to take over the debt and pay it to the Bank (by four instalments, three of which were of £100,000 each, payable in December, 1891, and June and December, 1892, the remaining instalment being the balance of the debt, which was to be paid in June, 1893), together with interest at bank rate, but not under £4 per cent.

During the months of January, February, and March, 1892, the company paid the Bank sums amounting to the first instalment of £100,000.

Shortly before the date on which the second instalment became due (30th of June, 1892) the company intimated to the Bank that they did not intend to carry out the alleged agreement or to pay the £100,000, and on the 1st of July, 1892, an action of the *Governor and Company of the Bank of England* v. *South American and Mexican Company Limited* (1892 B. 3089) was commenced in

(1) Law Rep. 1 H. L., Sc. 117.

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the Queen's Bench Division. By their statement of claim the Plaintiffs alleged (par. 1) that the Defendants were "indebted to the Plaintiffs in the sum of £100,000, being the second instalment of a sum of £514,300 agreed to be paid by the Defendants to the Plaintiffs, the said second instalment being payable on the 30th of June, 1892, the first instalment of £100,000 having been duly paid by the Defendants to the Plaintiffs," as above mentioned; (par. 2) that "it was part of the same agreement that the Defendants should pay interest at bank rate, but not under 4 per cent. per annum."

The statement of claim, after referring to particulars of the agreement delivered with the claim, concluded with a claim by the Plaintiffs for £100,000, and interest from the date of the writ until payment or judgment. The particulars delivered with the statement of claim were headed "Particulars of the agreement alleged in the statement of claim," and they stated as follows: "The agreement mentioned in paragraph 1 of the statement of claim was negotiated and made in and between the months of October, November, and December, 1891, and in January, 1892, and was confirmed or renewed on or about the 8th of February, 1892. It was partly in writing and partly verbal, and was made between the governor of the *Bank of England* acting on behalf of the Plaintiffs, and *H. F. Pollock* acting on the part of the Defendants. The writings leading up to and confirming the agreement were as follows:— [The names of the writers and recipients, and the dates of the letters, were here set out]. The interviews between the governor and *H. F. Pollock* were on numerous occasions in and between the months of October, 1891, and January, 1892, the dates whereof cannot be more particularly given. There was a further interview on the 8th of February, 1892, between the governor and *H. F. Pollock* and between Mr. *May*, the chief cashier, on behalf of the Plaintiffs, and *H. F. Pollock*, at which the following documents were discussed—draft form of promissory note; draft letter (*Murrieta & Co.* to the governor)."

By their statement of defence (par. 1) the company denied, for the reasons thereinafter stated, that they were indebted to the Plaintiffs in any sum whatever. Par. 2 was as follows: "The Defendants deny the alleged agreement mentioned in the state-

ment of claim. There never was any such or any agreement between the Plaintiffs and the Defendants." By par. 3 the company said there were negotiations between themselves and the Plaintiffs, and that there never was any concluded or binding agreement between them; that the sums making up the first instalment of £100,000 were paid in contemplation of and with a view to a proposed agreement which was never concluded, and subject to the amalgamation thereinafter mentioned and not otherwise; and that part of such instalment was paid by certain guarantors after the company had disputed the right of the Plaintiffs to receive the same, and had protested against the payment. By. par 4 the company said that if there ever was any agreement—which the company wholly denied—it was conditional upon a proposed amalgamation between *C. de Murrieta & Co.* and the company being successfully carried through and completed; that such amalgamation never was successfully carried through or completed; and that the alleged agreement never became binding, or operative, or in force. By par. 5 the company said they never authorized any person to make the alleged agreement on their behalf, except subject to the amalgamation being successfully carried through and completed; and by par. 6 they set up sect. 4 of the *Statute of Frauds* (29 Car. 2, c. 3).

And by way of counter-claim and set-off the Defendants said as follows:—

"1. The Plaintiffs are indebted to the Defendants in the sum of £100,000 for moneys had and received by the Plaintiffs for the use of the Defendants, the said sum being the moneys mentioned in the claim, and having been paid by the Defendants under the circumstances stated in par. 3, and conditionally only, and the consideration for such payments having wholly failed.

"2. The Defendants claim £100,000."

By their reply the Plaintiffs joined issue on the defence, and, as to the counter-claim, said that the sum of £100,000 was paid in part performance of the agreement, and without any condition or agreement, express or implied, to repay the same. The action was being tried before Mr. Justice *Kennedy*, when, after some evidence had been given on behalf of the Plaintiffs, Mr.

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Finlay, Q.C., one of the Plaintiffs' counsel, said: "The right of the Bank to recover in this action being admitted, judgment has been taken upon terms which need not be mentioned. The *Bank of England* felt that it was their duty to establish their right to recover . . . the terms have been agreed upon between the parties."

Sir *Horace Davey*, Q.C., one of the Defendants' counsel, said: "I think I ought to say that my clients, as a matter of business, and for reasons with which I need not trouble your Lordship, have now compromised this action upon terms which are satisfactory to the Bank and to my clients; but it must not be supposed that, if the case had gone on, I should have acquiesced in the view of the case presented by my learned friend."

The judgment as drawn up and entered (on the 30th of June, 1893) was as follows:—

"This action having on the 29th and 30th days of June, 1893, been tried before the Honourable Mr. Justice *Kennedy*, without a jury (by consent), in the City of *London*, and the said Honourable Mr. Justice *Kennedy*, on the said 30th day of June, 1893, having by consent ordered that judgment should be entered for the Plaintiffs on the claim for £100,000 and costs, and dismissed the counter-claim with costs; and the said Judge having also ordered, by consent, that execution should be stayed except as to costs, and that if, within three weeks from the said 30th day of June, 1893, the sum of £60,000 were paid to the Plaintiffs, or £20,000 were paid and £40,000 secured by the promissory note [as therein mentioned], the Plaintiffs should accept it (when such promissory note was duly paid) as in full discharge of all claim on the Defendants; and the said Judge having also ordered, by the like consent, that the Plaintiffs should realize the securities in the best interests of all concerned, and should account for the surplus, if any, to the parties entitled; and the said Judge having also ordered, by the like consent, that if the said sum of £20,000 should not be paid, and the said sum of £40,000 secured in the manner provided within three weeks from the said 20th day of June, 1893, as hereinbefore mentioned, or if the said promissory note should not be paid at the due date, then, in either of such cases, the Plaintiffs should be at liberty

to issue execution for the full amount of the judgment debt, after giving credit for any moneys (other than costs) previously paid under the now reciting order, and to enforce the payment of the further instalments claimed by them under the Plaintiffs' agreement with the Defendants, set out in the statement of claim in this action—It is this day adjudged that the Plaintiffs recover from the Defendants £100,000 and costs, to be taxed, and that the Defendants' counter-claim be dismissed, with costs to be taxed."

No part of the £60,000 mentioned in the judgment was paid, and on the 2nd of August, 1893, the company was ordered to be wound up by the Court. In the winding-up the Bank claimed to prove for the sum of £401,592 5*s.* 5*d.* (being the above-mentioned sum of £514,300, less the first instalment of £100,000 and the sum of £12,707 received as interest on securities held by the Bank), and interest from the 9th of January, 1892. In the affidavit in support of the claim the total value of the securities was estimated at £170,000.

The Official Receiver and Liquidator rejected the proof, substantially on the same grounds as those alleged as a defence to the action, and his notice of rejection of proof also stated "that under the circumstances the company is not bound by the judgment dated the 30th of June, 1893."

The Bank took out a summons asking that the decision of the Official Receiver and Liquidator rejecting the proof might be reversed, and that the proof might be admitted in whole. The summons was adjourned into Court and heard before Mr. Justice *Vaughan Williams* on the 19th and 20th of July, 1894.

It was conceded during the argument that the Bank were entitled to prove for the second instalment of £100,000.

Finlay, Q.C., *Greene*, Q.C., *R. M. Bray*, and *Howard Wright*, for the *Bank of England*:—

All the grounds relied on by the Respondents in support of his rejection of the proof were raised in the action; the existence of the agreement was denied, and put in issue by the defence and counter-claim. The judgment precludes the Respondents from denying that the agreement was binding on the company.

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The judgment embodied a compromise between the parties to the action which was a mutual arrangement that each party should give up something claimed by such party; but it clearly involved the proposition that the agreement existed. The question whether it existed or not was one which the parties came prepared to contest in the action; and a judgment on it, though by consent, is quite as conclusive as if it had been pronounced by the Court after the action had been fought out: *In re Flatau* (1); *Flitters* v. *Allfrey* (2).

[They were stopped by the Court.]

Moulton, Q.C., and *George Lawrence*, for the Official Receiver and Liquidator:—

There was no *res judicata* at all. The judgment was a mere bargain between the parties, whereby, if the company paid £20,000 and paid or found security for the balance of £60,000, the rest of the claim, not only as to the £100,000, but as to everything under the agreement, was to be abandoned; but if the money was not paid and secured as agreed, the Bank were to have judgment for the £100,000, and were to take whatever proceedings they thought proper with regard to the rest of their claims. But there was no bargain in that case as to the rest of such claims.

The Court never exercised its mind on the question raised by the pleadings, and the company are not estopped from raising the question in other proceedings.

[VAUGHAN WILLIAMS, J.:—*Newington* v. *Levy* (3) clearly establishes that there may be estoppel by judgment without the mind of the Court having been exercised.]

That was not a case of estoppel by *res judicata*; it was estoppel by action. There was no judgment in this case on any particular issue—that is to say, as to rights or *status*. The observations of counsel at the trial shew that it was not intended that any liability on the agreement should be admitted.

With reference to the instalments beyond the one sued for, the Plaintiffs were relegated to their original claim.

(1) [1893] 2 Q. B. 219. (2) Law Rep. 10 C. P. 29.
(3) Law Rep. 6 C. P. 180.

A judgment by agreement does not have the same effect, as regards the *res adjudicata*, as a judgment not by consent—for instance, where a claim for a declaration as to a right of way is compromised, the public are not precluded from again raising the question: *Jenkins* v. *Robertson* (1). The question there was, What makes a thing *res judicata*? Where the Court acts, not in a judicial, but in an administrative manner, as by registering a bargain, there is no *res judicata*. Judgment by default for a sum of money is conclusive as to that sum, but not as to the facts alleged in support of the claim for it.

[Vaughan Williams, J., referred to *Howlett* v. *Tarte* (2).]

A judgment is conclusive, not only with reference to the actual matter decided, but also with reference to the grounds of the decision—but only as to such grounds if they can be clearly discovered from the judgment: *Alison's Case* (3). In this case it is impossible to say that the Court arrived at a decision on any ground. Although judgment directly upon a point is conclusive upon the same matter, between the same parties, coming incidentally in question in another Court for a different purpose, the judgment is not conclusive evidence of any matter which came collaterally in question, or of any matter incidentally cognizable, or to be inferred by argument from the judgment: *Reg.* v. *Hutchings* (4). In order to make out that there is a good estoppel, the plea must shew that the point relied on as a defence was in the former proceeding decided against the plaintiff: *Carter* v. *James* (5).

Finlay, in reply:—

In *Carter* v. *James*, "the attention of the Court . . . . was not called to the effect of the admission by pleading over in the former action, the verdict on the issue having been found against the plaintiff, and a protestation being therefore ineffectual to prevent his being bound by the admission implied from pleading over": *Smith's* Leading Cases (6). It is true that there was an agreement at the trial, but what was agreed was

(1) Law Rep. 1 H. L., Sc. 117.
(2) 10 C. B. (N.S.) 813.
(3) Law Rep. 9 Ch. 1, 25.
(4) 6 Q. B. D. 300, 304.
(5) 13 M. & W. 137.
(6) 9th Ed. vol. ii. p. 847.

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that judgment should be entered for the £100,000 claimed, and that the counter-claim should be dismissed. If it had not been intended that the agreement itself, on which the claim to the instalment was based, should be established, the course adopted would have been to withdraw the record, on the terms of the Defendants paying the Plaintiffs £100,000, and of there being a Judge's order if necessary. In *Alison's Case* (1) the difficulty arose from the judgment in the former case not in form stating on which plea the defendant was to succeed, but only stating that the plaintiffs were not entitled to recover any portion of the sum they claimed. *Jenkins* v. *Robertson* (2) has no application to the present case. In *Scotland* it is competent for any member of the public to bring an action of declarator to establish a public right, and if it is fully and fairly tried, the public are bound by the judgment. All that the House of Lords decided was, that if the pursuer compromises the action for some consideration to himself the public are not precluded from raising the question again.

Vaughan Williams, J.:—

I am of opinion that my decision must be in favour of the *Bank of England* and against the Official Receiver. My only reason for hesitating to come to such a decision has been that I could see so little ground for doubt in the matter that I was afraid I must be overlooking something; but I must now give judgment according to my own view of the matter.

Two questions arise. One question is, What would be the effect of this judgment, as an estoppel between the same parties, if the decision had been arrived at in the ordinary way, and not by consent? The other question is, whether it makes any difference that in this case the judgment was a judgment by consent. I will deal with the second question first, and as to that point I am of opinion that the fact that the judgment was by consent makes no difference whatsoever. It is quite true, of course, that a judgment by consent is based on agreement between the parties, and, if the judgment has not been drawn up in accordance with the agreement between the parties, that is,

(1) Law Rep. 1 Ch. 1, 25. (2) Law Rep. 1 H. L., Sc. 117.

at any time, a sufficient ground for altering the judgment and modifying it so as to make it accord with the agreement. It was said that the proper way of getting that done was by some motion or proceeding to reform or set aside the judgment. Generally, that would be so. But I do not know whether, in an action between the Official Receiver and Liquidator, who represents the creditors of the company, and the *Bank of England*, who were the Plaintiffs in the action, I should think it necessary to put the Official Receiver to resort to any such roundabout method. Very likely it would have been the proper course, as he represents the creditors, to let him go behind the judgment, and rely upon the agreement which was the basis of it, if such agreement and the judgment differed at all; but I need not decide that question, because it is not suggested here that the judgment has been drawn up otherwise than in accordance with the agreement. Indeed, it could not be so suggested, because here is the original of the memorandum which was signed by the counsel engaged in the action—Mr. *Finlay*, for the *Bank of England*, and Sir *Horace Davey*, for the *South American and Mexican Company*—and the judgment admittedly follows the memorandum.

Under these circumstances I have only to consider, with reference to the second question, Mr. *Moulton's* suggestion, that a judgment by consent, upon which the Court has not exercised its mind, does not and cannot raise an estoppel *inter partes*. I can only say this is the first time I have ever heard such a proposition suggested. It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the estate that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end.

The only one of the authorities cited to me to which I need refer is *Jenkins* v. *Robertson* (1); and I have only to say, with

(1) Law Rep. 1 H. L., Sc. 117.

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regard to that case, that it is no decision whatever upon the general law. The action was an action in which, according to the law of *Scotland*, one person is allowed, if he chooses, to represent the public; and apparently, according to the law of *Scotland*, the result of that action binds the public at large. All that the House of Lords decided was that such a result would not bind the public at large unless it was a result arrived at after judicial consideration, and that it would not bind the public if it was a result arrived at by consent, and *à fortiori* if such consent was a purchased consent. The decision does not seem to me to touch this matter at all.

Under these circumstances I have come to the conclusion that I must treat the judgment, in the action brought by the *Bank of England* against the company, although it was a judgment by consent, as being binding upon the parties to that action in just the same way as if it had been a judgment arrived at after the case had been fought out.

That being so, the only other question I have to consider is, In respect of what matters is this judgment conclusive? The action was brought to recover a sum of £100,000, the second instalment of a debt of £514,300 alleged by the statement of claim to have been agreed to be paid by the Defendants to the Plaintiffs at certain specified dates. Now, the identity of the agreement is established by the particulars which were delivered with the statement of claim. It seems to me perfectly impossible that the Plaintiffs could have recovered in that action without establishing that agreement.

The judgment, so far as it appears material, was as follows: "This action having . . . been tried before . . . Mr. Justice *Kennedy* without a jury (by consent) . . . and the said . . . Mr. Justice *Kennedy* . . . having by consent ordered that judgment should be entered for the Plaintiffs on the claim for £100,000 and costs, and dismissed the counter-claim with costs; and the said Judge having also ordered, by consent, that execution should be stayed, except as to costs, and that if, within three weeks from the . . . 30th of June, 1893, the sum of £60,000 were paid . . . the Plaintiffs should accept it . . . as in full discharge of all claim on the Defendants . . . It is . . . adjudged

that the Plaintiffs recover from the Defendants £100,000, and costs to be taxed . . . And that the Defendants' counter-claim be dismissed, with costs to be taxed."

Now, that seems to me to be a judgment for the £100,000 claimed in the statement of claim. I should have had no doubt as to that matter even if there had been no counter-claim, but the way in which the counter-claim is dealt with makes it all the more clear that the £100,000 mentioned in the judgment is the £100,000 claimed under the same agreement, the non-existence of which was the basis of the counter-claim. It is quite plain what was done in this action. The Plaintiffs alleged the existence of an agreement, and claimed £100,000 as an instalment under it. The Defendants said: "No such agreement existed. We, it is true, have paid you £100,000 under that agreement—the first instalment, as it was supposed to be—but there never was an agreement, and, therefore, you ought to pay us that £100,000 back again." That being so, the judgment quite plainly means that there was such an agreement, and, therefore, that there was to be judgment for the £100,000 claimed by the Plaintiffs, and that the counter-claim—which was for a return of the first instalment of £100,000, and was based on the non-existence of the agreement—failed.

Under these circumstances it seems to me abundantly clear that the existence of this particular agreement was of the essence of the Plaintiffs' claim in the action, and that it was impossible for the Plaintiffs to recover the instalment of £100,000 in the action unless the agreement alleged in the statement of claim existed. And Mr. *Moulton* did not deny that, if the judgment was a judgment for the particular £100,000 claimed in the statement of claim, the proof of the existence of the agreement would be essential to that judgment. But it was suggested that the putting in of the £100,000, the same figure as that claimed in respect of the instalment, was a mere accident, and that it really was not intended that any judgment should be taken on the claim in the statement of claim, but that what was intended was that there should be an amount payable by the Defendants to the Plaintiffs, not under the claim, not recoverable in respect of the claim, but an amount to secure which the parties

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had agreed that the pending action should be utilized as machinery.

All that I can say is, that if that was the intention of the parties, there was a very simple mode of carrying it out, which was not adopted by the parties. I hold that the judgment on the claim is a judgment for the £100,000 under the agreement alleged in the pleadings, and that the judgment, therefore, affirms the existence of the agreement, and that the judgment for the Plaintiffs on the counter-claim also affirms the existence of the agreement.

Under these circumstances it seems to me that on the application before me the Official Receiver cannot be allowed to question the claim of the *Bank of England*. Therefore, I shall give judgment accordingly. The decision of the Official Receiver must be reversed, and the proof must be admitted in the whole, with costs, but without prejudice to liberty to the Official Receiver to apply, if he wishes, to raise any question of mere account.

F. E.

C. A. From this judgment the Official Receiver and Liquidator appealed. The appeal was heard on the 6th of November, 1894.

Moulton, Q.C., and *George Lawrence*, for the Appellant, referred to *Jenkins* v. *Robertson* (1).

Finlay, Q.C., *Greene*, Q.C., *R. M. Bray*, and *Howard Wright*, for the *Bank of England*, were not called on.

Lord Herschell, L.C.:—

I think that the judgment of the learned Judge below in this case was right. An action had been brought by the Respondents against the *South American Company* claiming a sum of £100,000 as the second instalment of a larger sum agreed to be paid by the Defendants to the Plaintiffs. There was a counter-claim to recover back the sum paid as the first instalment, alleging that the agreement was only inchoate, or that it was conditional, and that the condition had not been performed.

(1) Law Rep. 1 H. L., Sc. 117.

The case was partly tried, and thereupon, by consent of the parties, an order was made that judgment should be entered for the Plaintiffs on the claim for £100,000 and costs, and that the counter-claim should be dismissed with costs. Now, it seems to me that a judgment for the Plaintiffs on the claim was not a judgment for them for a sum of £100,000 at large; it was a judgment for them on a claim of £100,000, being part of a debt due, namely, the second instalment. Then it was further ordered that execution should be stayed, and that if within three weeks £60,000 should be paid, £20,000 in cash and £40,000 by a promissory note, and if the promissory note was duly paid, that £60,000 should be taken in satisfaction of all claims—that is to say, all claims by the Plaintiffs under the agreement. Then it is further ordered that if the promissory note is not paid—and that was the event which happened—they should be at liberty to issue execution for the full amount of the judgment debt, and to enforce the payment of the further instalments claimed by them under the Plaintiffs' agreement with the Defendants. Although it is said that those words "under the agreement with the Defendants" do not appear in the minute signed by counsel, at all events the words appear that they shall be at liberty to enforce further instalments. Now, what is the meaning of that? It is said that, notwithstanding that agreement to give judgment for the claim, it was open to the Defendants to make default in paying the £60,000, and then to say, "As regards all but this one instalment, for which you have got judgment, the matter is at large; you have got judgment as for an instalment of a debt in respect of which you sue; but we are to be at liberty now to say there never was a debt at all; we cannot undo this £100,000, but we may dispute our liability to anything further." I do not think that is the meaning fairly to be gathered from the settlement arrived at or the order of the Judge. I do not think the fair meaning is that they were to be at liberty afterwards to dispute the existence of any debt at all, which is the present claim. It is to be observed that what the Plaintiffs are to be at liberty to enforce is further instalments. What is the meaning of that? Instalments of that debt the existence of which is recognised, and

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which is the basis of the judgment—that debt in respect of which judgment is then given for the instalment then due. It means "If we do not carry out our present arrangement with you you are to be at liberty to enforce payment of these further instalments"—not merely, as it seems to me, "You are to be at liberty then to take proceedings for payment of those further instalments or claims; and we are to be at liberty to insist that there never was any debt, and there never ought to have been any judgment, and that, therefore, there are no instalments due." I do not think that is the fair construction or the fair effect of an arrangement of this sort, where a judgment is given by consent. The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action. I think, therefore, the judgment should be affirmed, and the appeal dismissed with costs.

Lindley, L.J.:—

I do not think this case is arguable in a lawyer's sense of the expression. It is impossible to read the compromise without seeing that the necessary result of it is—and I believe the intention of the parties to it was—that the dispute between them should be brought to an end. I do not say that was all, because there was the money to be paid; but to say that it is competent to any person to re-open the litigation and dispute the validity of the claim is to say that which I think no lawyer could possibly for a moment assent to.

A. L. Smith, L.J., concurred.

Solicitors for the *Bank of England*: *Freshfields.*

Solicitors for the Official Receiver and Liquidator: *Hollams, Sons, Coward, & Hawksley.*

M. W.

PLEDGE *v.* CARR.

C. A. 1894 Nov. 12.

[1893 P. 821.]

Mortgage—First Mortgages of different Properties to distinct Mortgagees—Second Mortgage of all Properties to one Mortgagee—Subsequent Union of First Mortgages—Redemption—Consolidation.

The owner of several houses in the years 1863–1866 executed first mortgages of them to different mortgagees for distinct sums. In 1868 he gave a second mortgage on all the houses to the Plaintiff's predecessors in title. In 1885 the second mortgage was transferred to the Plaintiff. Before 1893 all the first mortgages had become vested in the Defendants. In 1893 the Plaintiff brought an action against the Defendants to redeem two of the first mortgages upon payment of the amount due under them only.

It was held by *Romer*, J., following *Vint* v. *Padget* (1) and *Tweedale* v. *Tweedale* (2), that the Defendants were entitled to consolidate all the first mortgages.

Held, by the Court of Appeal, that *Vint* v. *Padget*, being the decision of a Court of co-ordinate jurisdiction, could not be overruled by their Lordships, and that the appeal must be dismissed.

APPEAL from Mr. Justice *Romer* (3).

The facts and arguments are fully given in the report of the hearing in the Court below, and the following short statement will suffice for the purpose of the present report:—

James Banks, who was the owner of several houses, in the years 1863–1866 executed several first mortgages of them to several different mortgagees for distinct sums.

On the 20th of August, 1868, he mortgaged all these houses together by way of second mortgage to secure one sum to the Plaintiff's predecessors in title.

On the 1st of April, 1885, the second mortgage of the 20th of August, 1868, was transferred to the Plaintiff.

Before the commencement of this action all the first mortgages had become vested in the Defendants.

On the 30th of March, 1893, the Plaintiff brought this action against the Defendants, and claimed to redeem two of the first mortgages on payment of the amounts thereby secured. The

(1) 2 De G. & J. 611. (2) 23 Beav. 341.
(3) [1894] 2 Ch. 328.

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Defendants, however, claimed the right to consolidate all the first mortgages.

Under these circumstances, Mr. Justice *Romer*, following *Vint* v. *Padget* (1) and *Tweedale* v. *Tweedale* (2), held that the Defendants were entitled to consolidate their mortgages, and that the Plaintiff could not as against them redeem some of the properties included in the mortgage of the 20th of August, 1868, without redeeming all.

The Plaintiff appealed.

Bramwell Davis, for the Appellant:—

I am unable to distinguish *Vint* v. *Padget* from the present case, and if that case is to be treated as good law, and as an authority binding your Lordships, it would be fatal to the present appeal. But *Vint* v. *Padget* has been recently commented upon by the Court of Appeal in *Minter* v. *Carr* (3). It was not, it is true, necessary to decide in that case the question which arises here; but the observations made by the Court therein have thrown doubt upon the decision in *Vint* v. *Padget*, and I submit that it should not now be treated as good law.

Neville, Q.C., and *Edwin Ward* were not called upon.

LORD HERSCHELL L.C.:—

We cannot overrule *Vint* v. *Padget*, for that was the decision of a Court co-ordinate in jurisdiction with ourselves; all we can do, therefore, is to dismiss this appeal.

LINDLEY and A. L. SMITH, L.JJ., concurred.

Solicitors: *A. R. & H. Steele*, agents for *J. Minter, Folkestone; Talbot & Tasker.*

(1) 2 De G. & J. 611. (2) 23 Beav. 341.
(3) [1894] 3 Ch. 498.

W. W. K.

McILQUHAM *v.* TAYLOR.

[1894 M. 80.]

C. A.
1894
STIRLING, J.
July 13,
Aug. 7.
C. A.
Nov. 13.

Contract—Alternative Stipulations—Covenant to pay £1000 *or to transfer* £1000 *worth of Shares in Company to be formed by Covenantor—Company formed with Shares of different Classes—Breach of one Alternative—Right of Covenantee to enforce the other—Shares of no marketable value.*

The Defendant covenanted by deed within twelve months to pay the sum of £1000, or transfer to the Plaintiff £1000 worth of fully-paid shares, in a company to be formed by the Defendant. The Defendant formed the company with preference and ordinary shares, and, within the period named, transferred to the Plaintiff shares of the latter class of the nominal value of £1000, and purporting to be fully paid; but no contract in respect of them had been registered previous to their issue, nor were they in fact fully paid up in cash, and the Plaintiff refused to accept them. After the expiration of the twelve months a contract in respect of the shares was filed with the Registrar of Joint Stock Companies. The shares of the company were of no value, and had never been marketable.

In an action to recover the sum of £1000:—

Held, by *Stirling*, J., that the Plaintiff was not bound to accept shares in a company in which all the shareholders did not stand on a footing of equality, and that, as the Defendant had by so forming the company put it out of his power to comply with that branch of the covenant which related to the shares, he must perform the alternative and pay the £1000.

Studholme v. *Mandell* (1) followed.

Held, by the Court of Appeal, that "£1000 worth of shares" meant shares of that value in the market: and the shares transferred being of no marketable value, the judgment of *Stirling*, J., was affirmed on that ground.

THIS was an action to recover the sum of £1000 under a covenant contained in a deed dated the 2nd of December, 1892. The deed in question was an assignment of a lease (dated the 4th of April, 1889) of a certain blende mine. It was made between *John Paull* and *Griffith Williams*, in whom the lease was then vested, of the first part, the Plaintiffs *James McIlquham* and *William Michell* of the second part, and the Defendant *Henry E. Taylor* of the third part.

After a recital of an agreement by the parties of the first

(1) 1 Ld. Raym. 279.

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part to transfer the property to the Plaintiffs, the deed proceeded: "Whereas the said *H. E. Taylor* has since agreed with the said *J. McIlquham* and *W. Michell* for a transfer to him of the said lease of the 4th of April, 1889, and all the machinery and plant now being in or upon the said demised premises for the remainder of the term, subject to the payment of the rents and royalties and performance of the covenants and conditions contained therein for the sum of £2000, the sum of £1000 to be paid on the day of the date of these presents, and the sum of £1000, being the balance thereof, in fully paid-up shares in a company to be formed by the said *H. E. Taylor* for working the said mine and premises."

Then followed the assignment and the covenant in question, which was in these terms: "The said *H. E. Taylor* will within twelve calendar months from the date hereof pay the sum of £1000 to or hand over to or otherwise transfer into the names of the said *James McIlquham* and *William Michell* one thousand pounds worth of fully paid-up shares in a company to be formed by the said *H. E. Taylor*, within the said twelve months as aforesaid, for working the said mines and premises, the capital of such company not to exceed £12,000."

A company was duly formed and registered on the 20th of May, 1893. The memorandum of association stated, that amongst other objects of the company were to be the carrying out of the deed of assignment of the 2nd of December, 1892, and the acquiring by purchase of the lease of the mine in question. Clause 5 of the memorandum stated that the capital of the company was £12,000, divided into 1200 shares of £10 each, of which 600 were thereby declared to be A shares with £10 per cent. per annum preference, and 600 to be ordinary or B shares. The articles of the company provided that the company should as speedily as possible after incorporation enter into an agreement with *H. E. Taylor* to allot to him, credited as fully paid up, 600 B shares of the company to the nominal amount of £6000, and the sum of £4000 in cash, or 400 A shares of the company, also credited as fully paid-up, to the nominal amount of £4000, as the purchase-money for the said property.

Shortly after the incorporation of the company 100 B shares

expressed to be fully paid up were allotted to the Defendant; and on the 23rd of November, 1893, he executed a transfer of these 100 shares to the Plaintiffs. At that time no contract had been registered in respect of them under sect. 25 of the *Companies Act*, 1867. Such a contract, however, was, on the 16th of June, 1894, filed with the Registrar of Joint Stock Companies, so that it was now possible for the Defendant to transfer to the Plaintiffs fully paid shares in the company. It was proved that the shares of the company had never had any marketable value. Under these circumstances the Plaintiffs declined to accept a transfer of 100 B shares, and claimed payment of £1000 in cash.

The action was heard before Mr. Justice *Stirling* on the 13th of July, 1894.

Grosvenor Woods, Q.C., and *Griffith Jones*, for the Plaintiffs:—

Where there is a contract to perform some act, or in the alternative pay a sum of money, then if the act is not performed the sum of money is payable: *Deverill* v. *Burnell* (1).

[STIRLING, J.:—Is not the rule of law that where there is an alternative the measure of damages for breach of the contract is that which is least burdensome to the covenantor?]

That is the general rule; but not where the alternative is the payment of a certain sum of money: *Leake* on Contracts (2).

The twelve months having elapsed, the Defendant cannot now gives us the shares, and he is bound therefore to pay the money: *Barkworth* v. *Young* (3). The Defendant has disabled himself from carrying out the branch of the covenant relating to the shares by the way in which he has formed the company: *Hutton* v. *Scarborough Cliff Hotel Company* (4).

[STIRLING, J.:—Is that any longer law? It has been severely shaken in a recent decision.]

The Defendant cannot tender us shares which we are bound to accept. The shares were issued before the registration of a contract as required by sect. 25 of the Act of 1867; the covenant

(1) Law Rep. 8 C. P. 475.
(2) 3rd Ed. pp. 588, 589.
(3) 4 Drew. 1, 25.
(4) 2 Dr. & Sm. 521.

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to transfer fully paid shares has not therefore been satisfied, and the Plaintiffs could not safely take them as fully paid shares even after registration of a contract: *Ooregum Gold Mining Company of India* v. *Roper* (1).

Hastings, Q.C., and *Bramwell Davis*, for the Defendant:—

The contract is plainly an alternative one, and the construction depends upon which branch of the alternative is put first. In *Deverill* v. *Burnell* (2) the contract was to deliver the bills or pay the value, and the learned Judge said that if it had been put the other way the case would not have been arguable. Here it is to pay £1000 or transfer the shares, and the contract would be satisfied by the performance of either. That being so, the Plaintiffs are only entitled to damages in respect of that branch of the alternative which is least burdensome to the Defendant: *Cockburn* v. *Alexander* (3). At the time for the performance of the contract the shares had no value, and consequently the Plaintiffs are entitled to nothing more than nominal damages.

There is no stipulation in the contract that the shares shall be all of the same value. If the company had been already formed with *A.* and *B.* shares, the covenant would have been satisfied by the transfer of shares of either class.

Grosvenor Woods, in reply:—

On the construction of the covenant it is clear that the Plaintiffs were either to have £1000 or £1000 worth of shares. There is no authority that in a case of this kind the covenantor is at liberty to elect to perform the alternative which is most favourable to himself.

[STIRLING, J., referred to *Robinson* v. *Robinson* (4).]

The £1000 was meant to represent the equivalent in value of the shares. The Defendant is not entitled to elect to give us shares, and then say, "I do not transfer them, and you are only entitled to damages on that footing. Where there is a contract

(1) [1892] A. C. 125.
(2) Law Rep. 8 C. P. 475.
(3) 6 C. B. 791.
(4) 1 D. M. & G. 247.

to perform something which is impossible, and in the alternative something which is possible, then that which is possible must be performed. In the absence of any agreement to the contrary, if *A.* agrees with *B.* to form a company and give him shares in it, *A.* is bound to form his company with shares of equal value and give *B.* some of such shares: *Hutton* v. *Scarborough Cliff Hotel Company* (1).

These shares were not validly issued: *In re Eddystone Marine Insurance Company* (2); *Bland's Case* (3); and we cannot be forced to take them. Registration of a contract would not now protect us as holders. In any event, we are entitled to £1000 as the measure of damages for the breach of the covenant.

Hastings:—

Those authorities only go to this, that where a contract with a company is manifestly a sham, there being no real consideration, it cannot be validated by registration under sect. 25 of the Act of 1867. That does not apply here.

1894. Aug. 7. STIRLING, J. (after stating the facts, and observing that there had been a breach of the covenant to transfer £1000 worth of fully paid shares within twelve calendar months of the date of the deed, continued):—

Under these circumstances it was contended that the contract was to hand over or transfer to the Plaintiffs the shares described in the covenant, or in default to pay £1000, and it was said that, in consequence of default made by the Defendant, the £1000 is now payable. In support of that contention the case of *Deverill* v. *Burnell* (4) was cited. For the Defendant it was argued that the covenant is to perform one of two alternatives—either within twelve months to pay £1000 or to transfer the shares; that the result of the breach is that the Defendant has become liable to pay damages, but that such damages are to be assessed on the footing that the Defendant is entitled to select for performance that alternative which is the least burdensome to him. In support of that contention two cases were cited: *Cockburn* v.

(1) 2 Dr. & Sm. 521.
(2) [1893] 3 Ch. 9.
(3) [1893] 2 Ch. 612.
(4) Law Rep. 8 C. P. 475.

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Alexander (1) and *Robinson* v. *Robinson* (2), and it was said that, the shares being worthless, the Plaintiffs are entitled to nominal damages only. To this it was answered, that the Defendant has put it out of his power to perform the one branch of the covenant by forming the company with its capital divided into preference and ordinary shares, and that, even if the covenant be alternative, he must, under the circumstances, perform that branch of it which provides for payment in cash. I have come to the conclusion that the Plaintiffs are right in that contention, and it is consequently unnecessary to say what, in my view, is the strict construction of the covenant. I think that the shares which the Defendant undertook to transfer were to be shares in a company in which the shareholders all stood on a footing of equality. If the case were one of partnership, it would come within the *Partnership Act*, 1890, which provides, in sect. 2, subsect. 1, in accordance with the law as it was before the Act, that, subject to any agreement express or implied between the partners, all the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm. Therefore partners, in the absence of express stipulation, stand on an equal footing. In the same way, upon an agreement for a partnership, if the shares are not defined, the partners must come in on equal terms. As regards the position of shareholders in a company, as to whom nothing is said as to their rights *inter se*, the law may not be in a very settled state. The point was referred to in the House of Lords in *British and American Trustee and Finance Corporation* v. *Couper* (3). Lord *Macnaghten* there says: "In the case of *Hutton* v. *Scarborough Cliff Hotel Company* (4), the company's memorandum of association declared that the capital was divided into a certain number of shares. There was nothing in the memorandum or in the articles to indicate that the shares might be of different classes. The directors found that they could not issue the whole as ordinary shares. A special resolution was passed authorizing the directors to issue a certain number as preference shares. The proposed issue was

(1) 6 C. B. 791.
(2) 1 D. M. & G. 247.
(3) [1894] A. C. 399, 416.
(4) 2 Dr. & Sm. 521.

restrained at the suit of an ordinary shareholder, on the ground mainly that, although the company had passed a special resolution authorizing the issue of preference shares, they had not in terms altered one of the original articles which provided for equality among shareholders in respect of dividends. The company then passed a special resolution altering the obnoxious article. They were again met by an application for an injunction, and the injunction was granted by Vice-Chancellor *Kindersley* on the ground that there was an implied stipulation in the memorandum of association that all the shareholders should stand on an equal footing as to the receipt of dividends, and that what was proposed to be done was 'contrary to the very nature of a joint stock company,' and was 'an alteration in the constitution of the company.' It is difficult to understand what the learned Vice-Chancellor meant by the expression 'constitution of the company,' and it is difficult to deal with an argument resting on a phrase so vague. Nor is it easy to understand the Vice-Chancellor's view, that equality among shareholders in respect of dividends was an 'implied stipulation in the memorandum.' There is nothing in the Act of 1862, or in any other Act, requiring the memorandum to contain any reference to the rights of shareholders *inter se*. The division of the capital into shares of a certain fixed amount which must appear in the memorandum would not be altered or affected by issuing some of the shares as preference shares. The practical result of the decision has been that, except in cases coming within the rule laid down in *Harrison* v. *Mexican Railway Company* (1)—a decision which has not met with universal acceptance—no company limited by shares that has not taken power by its memorandum to issue preference shares has been able to raise additional capital in the manner most advantageous to its shareholders and its creditors. It seems to me that the decision in *Hutton* v. *Scarborough Cliff Hotel Company* (2) was not founded upon a sound view of the *Companies Act*, 1862, and I respectfully dissent from it. I have the less hesitation in expressing this view because I find that Lord Justice *Cotton* has disapproved of the chief ground on which the decision was based. 'In reality,' he says, in *Guinness* v. *Land*

(1) Law Rep. 19 Eq. 358. (2) 2 Dr. & Sm. 521.

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Corporation of Ireland (1), 'it is not by implication from the construction of the memorandum that the equality of the shareholders as regards dividends arises, but by the implication which the law raises as between partners, unless their contract has provided the contrary.' Lord Justice *Lindley*, in a later case (2), takes the same view. I agree that the equality of shareholders as regards dividends is not an implied condition of the memorandum. But I doubt whether it is necessary to have recourse to the doctrines of partnership. It seems to me that if the sum of the interests of persons concerned in a joint adventure is divided into shares of equal amount distinguished by numbers for the purpose of identification, but with no other distinction between them, express or implied, it follows as a self-evident proposition that the interests of the shareholders in respect of their shares as regards dividend and everything else must be equal."

The law, then, is that under an ordinary memorandum of association, according to which the capital of a company is divided into shares of equal amount, the interests of the shareholders must be equal in all respects. Whether in a company so constituted preference shares can be issued is a question the final decision of which has not yet been given, although, perhaps, in the present state of the authorities, it may be concluded in the Courts of first instance by *Hutton* v. *Scarborough Cliff Hotel Company* (3). However this may be, if preference shares were to be issued, a resolution of the company would be necessary to sanction the issue, and every shareholder would have an opportunity of voting on the question. In the present case the shares to be transferred under the agreement were to be shares in a company to be formed by the Defendant, the capital of which was not to exceed £12,000. In the absence of any stipulation to the contrary that means, in my judgment, a company having its capital divided into shares, all of which were to stand on an equal footing. If a company with preference or priority as regards part of its capital had been contemplated, I can hardly doubt that the agreement would have contained a stipulation as to the proportion of the preference capital and the ordinary capital, and

(1) 22 Ch. D. 377. (2) *In re South Durham Brewery Company*, 31 Ch. D. 261.
(3) 2 Dr. & Sm. 521.

as to whether the shares that were to be taken in payment were to be of one class or the other, or, if both, in what proportions. It seems to me that it could not have been intended to leave it to the Defendant to say whether all the shares except 100 should be issued as preference shares, carrying interest at any rate which he might think fit to determine. In my judgment, therefore, the company which was formed by the Defendant was not one in which the Plaintiffs could be compelled to accept shares, and, that being so, I think that the Defendant is bound to perform the other alternative of the covenant. As to that I may refer to the case of *Studholme* v. *Mandell* (1). There an action of covenant was brought by the plaintiffs upon covenants in an indenture by which the plaintiffs demised a mill to the defendant, and in which the defendant covenanted to leave the mill-stones in as good condition as he found them, or to pay to the plaintiffs so much as they should be damnified; the damage to be estimated by *A.* and *B.*, who viewed them when the defendant entered upon the premises. The plaintiffs assigned for breach, that the defendant had left the mill-stones damnified, and had not made satisfaction. The defendant pleaded that *A.* and *B.* had not estimated the damage. The plaintiffs demurred. It was argued for the defendant, that this was a condition disjunctive, and therefore the leaving of the mill-stones damnified would not be a breach, because at the time of the covenant he had elected to perform the one or the other part; therefore (according to *Laughter's Case* (2)), without estimation by *A.* and *B.* of the damage of the mill-stones, the defendant was excused from the performance, because it was impossible for him to make the adjudication, or to compel *A.* and *B.* to do it; and till that be done, the defendant could not be liable, no more than if *A.* entering into bond to perform the award of *B.* and *C.*, and *B.* and *C.* would not make any award. Against that it was said in effect, "These covenants are part of the condition of the bond. And since the latter part of this disjunctive covenant is for the safety of the defendant, it belongs to him to procure this estimation, or otherwise he shall be liable. If the estimation

(1) 1 Ld. Raym. 279.
(2) 5 Rep. 21 b.; Cro. Eliz. 398; Sir F. Moore, 357.

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ought to be made by such persons as the obligee should appoint, and the obligee had refused to appoint, this would have excused the defendant; because the performance of the covenant is rendered impossible by the act of the obligee. But in this case the fact is contrary." And of that opinion was the whole Court, and *Treby*, C.J., put this case (1), *A.* in consideration of £100 bound himself in a bond, with condition either to make a lease for the life of the obligee before such a day, or to pay him £100. The obligee died before the day, yet it was adjudged that the obligor should pay the £100, and not the damages which had been suffered if he had got a lease for his life, and accordingly there was judgment for the plaintiff.

It seems to me that that is an authority that in such a case as the present, the default in the performance of the one alternative being due to the act of the Defendant, who might have formed his company in another way, he is bound to perform the other alternative. Consequently, there must be judgment for the Plaintiffs for £1000 with costs.

G. A. S.

C. A.

From this judgment the Defendant appealed. The appeal was heard on the 13th of November, 1894.

Hastings, Q.C., and *Bramwell Davis*, for the Appellant:—

The ground upon which the learned Judge decided the case was that the Plaintiffs were not bound to accept shares in a company in which all the shares were not on an equality. But there is no contract in the deed of covenant, either express or implied, that there should be any such equality in the shares in the intended company. The case on which he relied—*British and American Trustee and Finance Corporation* v. *Couper* (2)—has no application to the present case.

But it is also said that the Plaintiffs were entitled to shares to the value of £1000. That is not the true construction of the deed. The recital shews that what was meant was shares of the nominal amount of £1000. If the construction contended for were correct, there would be no meaning in the alternative cove-

(1) S.C. Salk. 170, pl. 2. (2) [1894] A. C. 399.

nant, for the payment of £1000 and the transfer of shares worth £1000 in the market are practically the same thing.

Grosvenor Woods, Q.C., and *Griffith Jones*, for the Plaintiffs, were not called on.

LORD HALSBURY:—

I confess that in this case I have not been able to entertain any doubt from the first time when the covenant was read to me. I should construe it as I should construe the language of any ordinary document. I think if the covenant itself is not ambiguous I have no right to refer either to the recitals or to the statement of the consideration; and it seems to me, without at all going into the reasons of the learned Judge below for his judgment, that it would not be proper to hold that those words are not to be taken in their ordinary natural meaning—that the Plaintiffs were to have £1000 worth of shares. It is vain to contend that if you take any other construction of the language you do not have to strike out the word "worth" altogether. Therefore, upon the ordinary principle of construction, if there is nothing cutting down the natural meaning of the word I must construe it to be the natural meaning of the word. You cannot construe an instrument of this sort by striking out a word, and asking us to read the document in such a way as to make that word inoperative. I am of opinion that the Court below was right—that the true construction of the language is that there were to be £1000 worth of shares; and it is admitted that these shares were not worth £1000. The appeal must be dismissed with costs.

LINDLEY, L.J.:—

I am of the same opinion. The covenant is by *Taylor* that he will within twelve calendar months of the date of the document pay £1000, or hand over to, or otherwise transfer into the names of, the Plaintiffs £1000 worth of fully paid-up shares in a company to be formed by *Taylor*, the capital of which is not to exceed £12,000. Now, what does that mean? Mr. *Graham Hastings* has invited us to construe it that he will pay £1000 in

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cash or in shares, meaning that he will transfer shares to the nominal value of £1000. I do not think that that is the fair meaning of the language used. I put to Mr. *Graham Hastings* another aspect of the case: supposing these shares had gone up, and *Taylor* had offered and tendered a smaller number than £1000 in nominal value, but £1000 worth in the market, what would have been the answer? The shares would be taken at their value according to the market. It is the same question from another point of view; but it strikes me that the answer to it is clear. No one in the case supposed could have accused *Taylor* of breaking his contract; he would have done exactly what he said he would do—paid £1000 worth of shares. Reliance has been placed on the recitals, and the recitals, no doubt, express the intention of the parties in language somewhat different; but I do not think it is right to construe the plain words of this covenant with reference to the language of the recitals, more especially as the draftsman has departed from the view which he entertained when he drew the recital. There is no covenant here to form a particular company with a defined capital. The covenant is to pay the money or £1000 worth of shares in a company to be formed; and although, of course, the recitals from one point of view help Mr. *Graham Hastings*, the covenant that he is to pay £1000 worth is against him. I think the only safe way is to adhere to the language of the covenant, which, to my mind, is perfectly plain.

RIGBY, L.J.:—

I am of the same opinion. The word "worth" is not only an important word, but it appears to me to be the important word in that covenant. What does "worth" mean? It means worth in the sense of the real value to be ascertained in some manner. There can be no difficulty in ascertaining it; it does not mean nominal value. A thing may be of the nominal value of £100,000, or, as in this case, £1000, and yet not be worth a farthing. I do not consider that the covenant is in any way ambiguous. If it had been, I do not see that we should have got any light from the recitals, or from the consideration, because I consider they are very ambiguous, and that they do not exclude the meaning

which is given in the covenant. The better way, however, to put it, undoubtedly is that unless we see that there is something ambiguous in the covenant itself, we ought not to care about the consideration.

Solicitors: *R. Jenkins*, agent for *Smith, Owen, & Davies, Aberystwith; Daniel Jones*, agent for *A. J. Hughes, Aberytswith.*

M. W.

CHITTY, J.
1894
Nov. 1.

In re GRAHAM.
GRAHAM *v.* NOAKES.

[1884 G. 3.]

Receiver—Receiver's Recognizance—Rents and Profits of Real Estate—Insurance Money—Repairs—Sureties—Extent of Liability.

In ascertaining the liability of sureties under a receiver's recognizance, the Court proceeds on the principle that the surety is liable (to the extent of the amount of the penalty) for all sums of money which the receiver himself was properly liable to pay into Court or account for: consequently, where a receiver of "rents and profits" of real estate had (1.) insured some of the farm buildings in his own name, and received and misapplied the insurance money, had (2.) received, and not accounted for, dividends on Consols in Court representing proceeds of sale of real estate, had (3.) received, under an order of the Court, money representing personal estate, to be spent in repairs, which he had misappropriated:—

Held, that the sureties had been properly charged in respect of these three items.

Practice and duties of receivers of rents and profits as to insurance and repairs discussed.

Adjourned summons.

The question raised by this application was, the extent of the liability of the sureties of a defaulting receiver of rents and profits of real estate, under the terms of the usual receiver's recognizance. The facts material for the purposes of this report were as follows:—

In April, 1884, a receiver was appointed in this action of the "rents and profits of the real estate" of the testator *James Graham*. Security with two sureties was given in the usual way on this appointment. By the recognizance, which was in the form given in Appendix L to Rules of Supreme Court, 1883, Form 21, the receiver, and two sureties, were jointly and severally bound in the sum of £3500, the condition of the bond being, that if the receiver "shall duly account for all and every the sum or sums of money which he shall so receive on account of the rents and profits of the real estate of the said testator, at such periods as the said Court or Judge shall appoint, and do

and shall duly pay the balances which shall from time to time be certified to be due from him," the recognizance shall be void.

In the early part of the year 1894 the receiver got into difficulties and absconded, and by an order of the 15th of February, 1894, he was discharged, and ordered to leave his final account at Chambers, and pay into Court the balance certified to be due from him. This order not having been complied with, and the sureties having submitted to the jurisdiction of the Court in this action, as fully as if an action to enforce their bond and recognizance as sureties for the receiver had been brought, the receiver's accounts were taken in their presence, when the question was raised whether, under the terms of this recognizance, the sureties were liable for anything more than "rents and profits," and particularly, whether they could be charged in respect of the following items:—

(1.) A sum of £350 for fire insurance money, as to which it appeared that the receiver had in 1885 insured some farm buildings in his own name, describing himself in the policy as "receiver of the rents and profits" of the testator's estate; that he had charged and been allowed the premiums in his accounts; a fire having occurred in 1893, that he had received and misapplied the insurance money.

(2.) Various sums amounting to about £100, paid to the receiver under divers orders of the Court, out of dividends on Consols in Court representing the proceeds of sale of part of the real estate sold by order of the Court pending the action, and after the date of the order appointing him receiver, such proceeds of sale standing to a separate account to be re-invested, under the trusts of the will, in real estate.

(3.) A sum of £21, balance of a sum of £220, paid to the receiver, under an order of the Court, out of moneys representing personal estate, to be applied in repairs on the real estate, £199 only having been spent in repairs.

Byrne, Q.C., and *T. L. Wilkinson*, for the sureties:—

Item 1 is capital: it represents real estate, and is in no sense "rents and profits," and, therefore, not within the terms of the recognizance. There was no order directing the receiver to

CHITTY, J. 1894 *In re* GRAHAM. GRAHAM *v.* NOAKES.

insure, and no existing policy to be kept up; but the receiver started a fresh insurance in his own name—a most unusual course of proceeding. If this surcharge is allowed, a receiver might insure a mansion-house, or the pictures, for a very large sum, and then if he received and misapplied the insurance money the sureties of "rents and profits" only would be liable. *Maunsell* v. *Egan* (1), one of the cases that will be relied on by the Plaintiffs, does not govern the present case: there the form of the recognizance was different, and it was mainly a question of the costs incurred through the receiver not doing his duty. *Dawson* v. *Raynes* (2) is also distinguishable; so, too, is *In re Lockey* (3). This sum of £350 is quite outside the scope of the order appointing this receiver and the recognizance, and the sureties are not liable to make it good. Item No. 2 represents dividends paid out under various orders of the Court, and does not represent rents and profits; and item No. 3 is money paid out of personal estate for repairs, and not rents and profits for which we are liable.

[CHITTY, J.:—It is stated in *Kerr* on Receivers (4) that the surety is answerable to the extent of the amount of his recognizance for whatever sum of money, whether principal, interest, or costs, the receiver has become liable for.]

That proposition is far too wide: probably it was intended by this recognizance to make the sureties liable for everything; but as a matter of construction we submit that it fails to go as far as that.

Levett, Q.C., and *Bramwell Davis*, for the Plaintiffs:—

The sureties are liable for the balances unaccounted for to the extent of the penalty, and cannot be relieved from their liability, except upon paying everything that the Plaintiffs would have got, if this receiver had duly accounted for the rents and profits, and duly paid into Court the balances certified to be due from him. They must pay all that their principal can be required to pay: *Dawson* v. *Raynes*; *Maunsell* v. *Egan*.

(1) 3 J. & Lat. 251.
(2) 2 Russ. 466.
(3) 1 Ph. 509.
(4) 3rd Ed. p. 217.

It was quite proper that these buildings should be insured; the premiums were all allowed in passing the accounts from 1885 to 1892; the policy moneys were paid to him in his capacity of receiver; the dividends making up item 2 were clearly profits of real estate. Then as to item 3: this money was paid to him, in his capacity as receiver, for repairs; it is the duty of a receiver to do repairs. The meaning of this recognizance is, that the estate is to be guaranteed against the misconduct of the receiver, and the liability of these sureties, up to £3500, is co-extensive with that of the receiver. The surcharges made in respect of these three items are therefore proper, and ought to be allowed.

Byrne, in reply:—

The Plaintiffs' argument amounts to this, that whatever the form of the recognizance, and even though the order only appoints the receiver to collect "rents and profits," still the sureties are liable for everything the receiver does or receives. No authority has been cited for so sweeping a proposition. It is one thing to be a surety for rents and profits, and quite another thing to be a surety for *corpus* of the estate. This is an attempt to make sureties only of "rents" liable for capital received and misapplied by the receiver.

CHITTY, J. (after stating the form of the recognizance, continued):—

The argument for the sureties raises the question of the principle upon which this account is to be taken, as against the sureties. Now, it is clear that at Common Law, there having been default on the part of the receiver, the whole sum of £3500, mentioned in the recognizance, is recoverable as against the sureties; and if authority be required on that point it is furnished by the certificate that was given by the Judges in *Dawson* v. *Raynes* (1), who were of opinion that if there had been any breach of the condition of the recognizance, the penalty was a debt at law; and the question of interest did not arise at law.

(1) 2 Russ. 468.

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The practice is, as stated by *Kerr* on Receivers (1), and as is well known, when the recognizance is put in force at law, to apply to the Court by whom the receiver has been appointed to submit to the jurisdiction, and offer to have the account taken by the Court who appointed the receiver. On taking the account, the Court does not necessarily exact the full amount of the sum mentioned in the recognizance; but the Court, when it looks into the case, and considers the nature of the office of the receiver in the circumstances, applies not a principle of contract, but a principle of equity, to the account, and relieves the sureties against demands which the Court, on a full consideration of the matter, thinks the sureties ought to have allowed in their favour. Mr. *Kerr* in his book states that "the surety is answerable to the extent of the amount of the recognizance for whatever sum of money, whether principal, interest, or costs, the receiver has become liable for, including the costs of his removal, and of the appointment of a new receiver in his place"; and, in my opinion, that is a correct general statement of the principle on which the Court proceeds.

In *Dawson* v. *Raynes* (2) the Lord Chancellor pointed out that the penalty was forfeited by breach of the condition; the amount of the penalty is the debt due from the sureties; but he did consider the question whether they should be charged, in taking the account, with interest; and in the circumstances of that case, that is to say, upon equitable considerations, he relieved them from the penalty of the recognizance to the extent of the demand made against them for interest. He says (3): "It seems to me that it would be difficult to say, that, where the principal debtor"—that is the receiver—"would be obliged to pay interest, there would not be an equity that the surety should pay the interest in default of the principal."

Now, having stated what I take to be the principle on which the Court proceeds, I am in a position to deal with the particular items. The first item is the sum of £350. With regard to this insurance it appears that, in the former accounts passed by the receiver, he had been allowed by the Court, and properly

(1) 3rd Ed. p. 217. (2) 2 Russ. 466.
(3) 2 Russ. 471.

allowed, the premiums which he had paid. The policy itself is referred to in the former accounts, and the Court therefore sanctioned this insurance, and, I think, I am justified in saying, sanctioned the insurance in the receiver's own name. I have inquired into the matter. It is, say my Chief Clerks, the practice for receivers to insure; but I am not satisfied one way or the other whether they insure in their own names. Of course, they might insure the property in the names of the trustees or in other names, though this receiver was allowed to insure in the manner I have mentioned. In many cases when receivers are appointed there is an insurance already on foot, and then he takes over the policy, pays the premiums, and is allowed them on passing his accounts. It appears to me that it is consistent with his duty as receiver, and that the Court has itself sanctioned it, that he should make and keep this insurance on foot; and I think that he received the insurance money as receiver. The policy, on the face of it, was granted to him on that footing.

It appears to me that what the receiver did with regard to this insurance, was done by him in his character of receiver; that he himself, in accounting to the Court, would have been held liable to account for these moneys; and when I am considering the equities fairly applicable to a case of this kind, it seems to me that if I charge him, as I must have charged him, as between himself and the Court, with the amount of this insurance money thus received, so I ought to charge the sureties. I think there is no equity on their part sufficient to justify me in saying that they ought to be relieved against this charge for £350. Some cases, of course, may be put where possibly orders might be made which would be altogether outside the scope of the receivership. That is not the case which I am dealing with here on this first item, and any case of that kind may be left to be considered when it arises. In my opinion, the sureties are chargeable with the sum that the receiver received on this policy, and did not apply in accordance with his duty.

The next item is as to the sum of £100. Under orders of the Court the receiver received these dividends as part of the income of the real estate. In my opinion, this again was within the scope of his duty as receiver, and I ought not to relieve the

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sureties, who are liable (as I have said) at law to the full extent of £3500, in respect of this income, which was income of real estate, seeing that the money in Court was liable to be laid out in the purchase of other land. It was strictly income—that is to say, profits of real estate.

Then the next item is the sum of £21, balance of moneys which ought to have been spent in repairs on the real estate. Now, repairs of real estate fall within the scope of the receiver's duty: he is allowed to do certain repairs without even coming to the Court. In fact, he may at his own risk execute repairs of a more extensive kind. There is no exact rule that I know of as to the amount that he may do upon his own responsibility; but, of course, what he does upon his own responsibility is liable to be questioned, unless he has obtained the previous sanction. Proper repairs of real estate appear to me again to be a matter which falls within the functions of a receiver, where the receiver is appointed to receive the rents and profits. That being so, it appears to me again that I ought not to relieve the sureties from this sum of £21, with which the Chief Clerk has proposed to charge the sureties.

The result, therefore, is that the surcharges made in respect of these three items are proper and must be allowed; and as the sureties have failed in their contention, the costs of this application must be costs of the surcharge.

Solicitors: *Indermaur & Brown*, agents for *C. Hamilton White, Maidstone; A. H. Arnould & Son.*

W. C. D.

In re NEGUS.

CHITTY, J.

1894

Nov. 1, 3, 6.

Solicitor and Client—Costs—Taxation—Agreement for Tenancy for less than Three Years—"Leases or Agreements for Leases, at Rack-rents"—Scale Fee—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *ss.* 2, 4—*General Order under Solicitors' Remuneration Act*, 1881, *r.* 2, *Sched. I., Part II.—Lessor and Lessee—Cost of Counterpart.*

In the absence of any prior written agreement, the Taxing Master is bound to tax according to scale in all cases where the scale is applicable, notwithstanding the fact that an item bill has been delivered at the request of the client. The fact that a solicitor has delivered an item bill in the first instance does not preclude him, when before the Taxing Master, from consenting to its being taxed according to scale. *In re Heather* (1) held not to apply to such a case.

The costs of the lessor's solicitor "for preparing, settling, and completing" an agreement for a tenancy for less than three years at a rack-rent are to be taxed according to the scale prescribed for "Leases or Agreements for Leases at a Rack-rent" in Schedule I., Part II., to the General Order under the *Solicitors' Remuneration Act*, 1881.

In estimating the costs properly payable by the lessee to the lessor's solicitor, the cost of the counterpart or duplicate agreement must be deducted from the scale fee when ascertained.

SUMMONS to review a taxation of costs.

The question raised by this application was whether a tenancy agreement for a term not exceeding three years at a rack-rent was a "lease" or "agreement for lease," to which the scale, prescribed by Schedule I., Part II., of the General Order under *Solicitors' Remuneration Act*, 1881, applied, or whether it ought to be taxed under the old system, as altered by Schedule II.

In April, 1894, a tenancy agreement was prepared by one *W. Negus*, the landlord's solicitor, by which "the landlord agreed to let," and "the tenant agreed to take," for the purposes of his business, a flat in *Bond Street*, from the 25th of March, 1894, for the term of three years, at the yearly rent, for the first fifteen months of the said term, of £290 per annum, and for the last twenty-one months of the said term, of £275 per annum, payable quarterly, upon certain terms and conditions as to user, &c., specified in the agreement. The agreement had been engrossed

(1) Law Rep. 5 Ch. 694.

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in duplicate, and signed by both parties, but had not been handed to the tenant, though he had been let into possession of the premises on the 19th of the same month of April.

At the request of the tenant, Mr. *Negus* delivered to him an item bill under the old system as altered by Schedule II. of his costs for preparing the agreement, which, with £1 15*s.* 7*d.* for disbursements, amounted to £14 14*s.* 7*d.* An order of course for taxation of this bill was obtained by the tenant, under the third party clauses of the *Solicitors Act.* On this bill of costs coming before the Taxing Master, he considered that the scale prescribed by Schedule I., Part II., of the General Order under the *Solicitors' Remuneration Act*, 1881, applied, and taxed the bill on that footing at £14 0*s.* 7*d.* Mr. *Negus* was willing to accept this taxation as correct; but the tenant objected that the fee prescribed by Schedule I., Part II., was not applicable, as this was a mere tenancy agreement under hand only for a term not exceeding three years, and that such an agreement was neither a "lease" nor an "agreement for lease" within the meaning of Schedule I., Part II.; and further, that the bill, as delivered, contained many items which the tenant had not undertaken to pay, and for which he was not liable under any law or custom, and therefore that the bill ought to be taxed as an item bill, and only such charges allowed as were reasonable and properly incurred in the preparation of the agreement. The Taxing Master overruled these objections, considering that the case was covered by the decision of *In re Emanuel and Simmonds* (1), in which Lord Justice *Cotton* had explained "agreement for lease" as meaning agreements on which the parties intended to rely as sufficient for the purpose of stating the terms of the tenancy without having a formal lease executed.

The tenant thereupon took out the present summons to review this taxation.

Whitehorne, Q.C., and *E. Ford*, for the summons:—

The scale fee is not applicable on three grounds.

First. Both parties, when they went before the Taxing Master, intended to have this bill of costs taxed as an item

(1) 33 Ch. D. 40.

bill under the old system; and under these circumstances the Taxing Master had no right, *mero motu*, to apply the scale prescribed by Schedule I., Part II.; and further, the solicitor having delivered an item bill, could not in effect withdraw it—*In re Heather* (1)—by consenting to have the scale applied, when he saw that it was to his advantage to be taxed according to scale.

Secondly. This tenancy agreement is neither "a lease" nor an "agreement for lease": the decisions of *In re Emanuel and Simmonds* (2) and *Savery* v. *Enfield Local Board* (3) do not touch this question; in both those cases the tenancies were for terms exceeding three years, and there was an actual lease, the only question being whether the scale fee covered the costs of the prior agreements. "Leases" or "agreements for leases" in Schedule I., Part II., must mean leases or agreements for leases by law required to be by deed or in writing: simple tenancy agreements were not intended to be included. "Rent" must mean "annual rent," and consequently would not meet the case of a tenancy for less than a year. If the Taxing Master's construction is correct, innumerable hard cases would arise—there might be an agreement to let a workman's room at 7*s.* a week, or an agreement to take a cottage, where the solicitor's remuneration under the scale might exceed the whole amount of rent. That could never have been intended.

Thirdly. The tenant is not bound to bear the expense of the counterpart or duplicate: *Jennings* v. *Major* (4); and the scale fee to the lessor's solicitor includes costs of counterpart. This is a third party taxation, and therefore the scale cannot apply, because we are not bound to pay for the counterpart.

On these grounds we contend that the taxation was wrong.

Manson, for Mr. *Negus*:—

The solicitor is not estopped by delivering an item bill from accepting the taxation by scale; both parties thought the scale did not apply—they both made a mistake; this agreement is a document on which the parties intended to rely as sufficiently

(1) Law Rep. 5 Ch. 694.
(2) 33 Ch. D. 40.
(3) [1893] A. C. 218.
(4) 8 Car. & P. 61.

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setting forth the terms of the tenancy, and is within the definition given by Lord Justice *Cotton* in *In re Emanuel and Simmonds* (1), and the Taxing Master was quite right in taxing it on the footing that the scale applied.

As to the costs of the counterpart or duplicate and the stamp, I am quite willing that the costs of that may be deducted from the amount allowed by the Taxing Master. The amount can be readily ascertained and agreed now to avoid a reference back to the Taxing Master.

Whitehorne, in reply.

CHITTY, J.:—

Both parties when before the Taxing Master in the first instance seem to have adopted the principle that this was an item bill, which had to be taxed on that footing. The Taxing Master himself considered that the scale applied; and assuming that he was right, still it is contended on behalf of the tenant that, in these circumstances, the Taxing Master could not of his own motion apply the scale. The argument did not proceed upon any doctrine of estoppel or question of conduct or misconduct, but on the circumstances I have mentioned, and probably the best form which the argument assumed was that which had relation to the case of *In re Heather* (2), where it was held that a solicitor could not withdraw a bill which he had once delivered without the consent of the client, and I may add, without an order of the Court. Consequently it was said, that Mr. *Negus* was bound by the bill which he had delivered, and must therefore submit, as a matter of law, to have his bill taxed as an item bill. It appears to me that the principle of *In re Heather*, which was decided before there was any distinction between scale and non-scale taxed costs, does not apply to this case.

It is the practice, I believe, for the Taxing Masters, where the solicitor brings in an item bill in a case to which the scale applies, to tax the bill by the scale; and I think that practice, which I understand from inquiry prevails, is perfectly right, on

(1) 33 Ch. D. 47. (2) Law Rep. 5 Ch. 694.

the ground that the Taxing Master is bound to tax according to law; he is bound to apply the general order relating to the taxing of bills in all cases where it is applicable. Now, though the solicitor here submitted a bill with items in the first instance, there having been no agreement in writing as between him and the tenant, or between him and the landlord, that the charges should be made on the non-scale principle, it was competent for him to acknowledge his error and to submit, when the parties were before the Taxing Master, to have his bill taxed according to scale; and that is the substance of what happened here, because, when Mr. *Negus* found that the Taxing Master was convinced that the scale applied, he at once assented, and the bill has been taxed upon that basis. It appears to me, therefore, that this first objection cannot be sustained.

Then I come to the second point argued, which raises a question of substance. It appears to me that this agreement is a "lease" or "agreement for a lease," within the meaning of Schedule I., Part II. (first scale). The Court of Appeal in *In re Emanuel and Simmonds* (1) have put a construction upon the meaning of the term "agreements for leases." The only point that the Court had to decide, and did decide in that case, that is relevant to the case before me, was, that the solicitor could not make a double charge, and that the meaning of the term "agreements for leases" in Schedule I., Part II., was not the strict meaning which would be applied to these terms, according to the technical view of the law, but that "agreements for leases" included (2) "Agreements on which the parties intended to rely as sufficient for the purpose of stating the terms on which the property was held without having formal leases executed." The Court of Appeal did not decide that the term "agreements for leases" did not include what the words primarily import, viz., an agreement for the granting of a lease, as distinct from an agreement which operates itself as a lease, but they put the construction that I have mentioned upon the words "agreements for leases"—a construction which, if I may take the liberty of saying so, is proper and reasonable. It would be an error to say that Lord Justice *Cotton* defined an agreement for a lease as being only

(1) 33 Ch. D. 40. (2) 33 Ch. D. 47.

CHITTY, J. 1894 *In re* NEGUS.

that which I have just quoted from his judgment. There is no strict definition, but there is an explanation of the term, shewing, as is mentioned particularly by Lord Justice *Bowen*, that the expression is intended to include documents of the kind already described.

Now, the argument for the tenant is, that the term "leases" or "agreements for leases" applies to such leases or agreements only as the law requires to be in writing, though it is admitted that there are no words, either at the commencement or any part of Schedule I. sufficient to justify the Court in accepting that interpretation. The argument is founded to some extent by suggesting cases of extreme hardship which might arise if it were held that the scale applied to any other kind of leases, or agreements for leases, and, consequently, that the scale ought, on the reasonable construction of such a rule as this, to be so construed as to exclude these causes of hardship.

It is quite unnecessary for me to enter into a dissertation on the term "lease," though I will state shortly that the term "lease" is used in strict law so as to include any demise, for any period however short or however long, and it is sufficient for this purpose to refer to the *Statute of Frauds* (29 Car. 2, c. 3), the first section of which, as is well known, enacts that all leases by parol, and not put in writing and signed by the parties making or creating the same or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only. The term "lease" is well known to the old lawyers and, I hope, to the modern ones. Then comes the 2nd section, which contains a well-known exception, though it still speaks of the excepted things as "leases": "Except all leases not exceeding the term of three years from the making thereof." I need not read the rest. So that the *Statute of Frauds* shews upon the very face of it that that which is a demise for a term not exceeding three years still is properly called at law a "lease," and that a lease may be made without any document whatever, but simply by word of mouth. Later in the same Act, the distinction between a lease, and an agreement for a lease, is maintained, because where the instrument is an agreement for a lease in the strict sense of the term, there the

4th section applies, that being a "contract of"—that means concerning—land.

Then comes the well-known statute of 8 & 9 Vict. c. 106, s. 3, which enacts, that a lease required by law to be in writing shall be void in law unless made by deed. Now, putting these enactments together, the result of the contention for the tenant is, that the scale does not apply except to leases which the law requires to be made by deed, and I am constrained to state that I cannot find that the words leases in writing or leases by deed are mentioned on the face of Schedule I. itself. I need hardly state that the schedule only applies when there is a document. The schedule is headed with "Lessor's solicitor for preparing, settling, and completing lease and counterpart," and consequently explains that there must be a document; but that is a long way off saying that the document must be a deed, and that it does not mean a deed seems to follow plainly from the term "agreements for leases" found in this schedule and interpreted as the words have been interpreted by the Court of Appeal in *In re Emanuel and Simmonds* (1). I am therefore unable to accept the construction contended for by the tenant as the right construction to be put upon the schedule. I agree that in ordinary parlance, and in conventional language, it may fairly be said that a distinction is constantly made between a "tenancy" and a "lease," and I daresay many solicitors speaking to their clients talk of a "lease" in the sense of meaning a lease which the law requires to be by deed; but I am unable to say that I can introduce this same loose parlance into the rule, and adopt it as having been the meaning of the great authorities by whom these rules were made under the *Solicitors' Remuneration Act* of 1881.

As to the cases of hardship, I am afraid that I must lay them aside, for they are to a large extent merely supposed cases, which do not often occur in the ordinary course of business; besides, I do not think that these rules were specially addressed one way or the other to cases of that kind, but if a person has to take a lease for a period less than three years and consults a solicitor, he may have a considerable amount of trouble (particularly in the case of a flat, as I know by my own experience here) in

(1) 33 Ch. D. 40.

CHITTY, J. 1894 *In re* NEGUS.

advising his client as to what he shall accept or decline. It does not appear to me reasonable to say that this 5*l.*, which is the minimum charge, must be regarded as so excessive as to justify the Court in putting an interpretation on the reading of the rule which would amount to a decision that the scale fee did not apply to the case of a letting, which the law does not require to be in writing.

The document in the present case relates to the letting of a flat. The documents have not been exchanged; but taxation proceeds upon the footing that they will be exchanged, so nothing turns upon that. The term does not exceed three years from the making thereof, if I look upon these non-exchanged instruments as documents pertaining to the demise. The words are, "the landlord agrees to let and the tenant to take"—words which have been interpreted—I need not refer now to the authorities—to operate as a present demise, and if the documents had been exchanged I think that the demise would have been made. There was to be immediate possession, and the documents were to be exchanged—the only reason for the non-exchange of them was this question of the amount to be paid by the tenant for the cost of their preparation.

The document which would enable the tenant to take possession would be a "lease" in point of law; but if by reason of its not having been exchanged it is to be considered only as an agreement for lease, then, on the face of the document itself, it is within the explanation of the term, as given by the Court of Appeal; for the parties here evidently intended to rely upon that document, and did not intend to have any formal lease by deed or otherwise executed.

One other point remains, viz., that this is a third party taxation, and the general rule is that a third party stands, as between himself and the solicitor whose bill he is taxing, in the position of the party chargeable. But that rule does not prevent the Taxing Master from considering the question of the liability of the third party. This has been decided, and, by way of illustration, I may refer to *In re Brown* (1). The trustee in that case was liable, as between himself and the solicitor who was defend-

(1) Law Rep. 4 Eq. 464.

ing his bill as against the *cestuis que trust*, for the items impeached; but Lord *Romilly* held that those items were properly disallowed by the Taxing Master because they could not have been charged as against the trust estate. The solicitor had pointed out to the trustee, as was his duty, that he would not be allowed to charge; but still the trustee insisted upon the work being done, and yet these items were struck out from the bill when it was taxed by a third party. Now it is part of the general law (though it is unnecessary to go into the authorities) that in the case of lessor and lessee, the lessee is not bound to pay for the counterpart, and the scale fee prescribed by Schedule I., Part II., includes the counterpart; the words in Schedule I. are, "Lessor's solicitor for preparing, settling, and completing lease and the counterpart," and the decisions upon these rules generally shew, that the business contemplated by the rules must be wholly performed by the solicitor in the transaction, in order to make the scale remuneration apply.

There was a counterpart in this case, and it is plain that the landlord was liable to his solicitor to pay for this counterpart; the Taxing Master in applying the scale, as he did, according to the amount of the rent, has necessarily included the charge for the counterpart, in respect of which there is no liability on the part of the tenant to the landlord; consequently, it was argued for the tenant, that the scale could not apply on this third party taxation. In my opinion that argument cannot be sustained, for these rules having—as has been well explained by Lord *Halsbury* in the case of *Savery* v. *Enfield Local Board* (1)—been made for the purpose of preventing disputes on taxation and providing some guidance as to the mode in which charges should be made, prescribed and fixed a gross sum for each document prepared, which could be known beforehand to any person able to employ a solicitor; and I cannot conceive it to have been the intention of the framers of the rules that whilst the landlord had to pay, say a minimum £5 to his solicitor, still the solicitor might be entitled to charge £10 or £20 on the non-scale system as against the lessee. My opinion is that this contention cannot prevail, and I think the Taxing Master was right in taxing this

(1) [1893] A. C. 225.

CHITTY, J. 1894 *In re* NEGUS.

bill in the manner he has done, as being the bill that the landlord has to pay. There is a novelty in the point about the counterpart, and I think that the only solution of this supposed difficulty that is reasonable and right is this—that the Taxing Master should tax, as he has done this bill, as he would have taxed it as between the solicitor and landlord, viz., on the scale footing, and then seeing that the tenant was only liable for the preparing, settling, and completing the lease, he should have made a reasonable deduction from the scale in respect of the counterpart. The parties here have been very reasonable, and they do not require me to send the bill back to the Taxing Master upon this small point: they have agreed that 5*s.* for the stamp duty on the counterpart, and 18*s.* in respect of the proper costs in relation to the counterpart, as distinct from the lease itself, should be deducted from the amount which the third party taxing has on the present taxation to pay. The result is, the application has substantially failed, and must be dismissed, and the tenant must therefore pay the costs.

Solicitors: *Daubeny & Mead; W. Negus.*

W. C. D.

In re PIERCY.
WHITWHAM *v.* PIERCY.

NORTH, J.

1894

Oct. 26, 27, 30; *Nov.* 1, 6.

[1888 P. 3082.]

Administration—Land situate in Foreign Country—Trusts invalid under Foreign Law—Valid Trust for Sale—Application of Proceeds of Sale—Election.

An English testator, who owned some land in *Sardinia*, by his will gave all his real and personal estate to trustees upon trust for sale and conversion, and to hold the same until conversion and the proceeds of sale after conversion, upon certain trusts (*inter alia*) for his children for their respective lives, with remainders to their respective issue. These trusts were (as the Court held on the evidence) to a great extent invalid under Italian law as regarded land in *Italy*, the result being that the tenants for life took their shares absolutely. Part of the land in *Sardinia* had been sold by the trustees:—

Held, that, whether the trustees or the children took the land as "heirs" according to the Italian law, the trustees had power under that law, and that it was their duty to sell the land, and that the proceeds of sale must be held by them upon the trusts declared by the will:

Held, also, that the rents of the unsold land until sale would devolve according to Italian law, but that it was competent to and legal for the children to elect that those rents should be applied as if they had been income resulting from the proceeds of sale.

SUMMONS to proceed with an inquiry directed by an order for the administration of the estate of *Benjamin Piercy*, who died in 1888.

Benjamin Piercy, by his will dated the 5th of December, 1883, devised and bequeathed all his real and personal estate whatsoever and wheresoever to which he should be beneficially entitled at the time of his decease unto *F. G. Whitwham*, *E. B. Bernard*, and *Evan Morris*, whom he thereby appointed trustees and executors of his will, upon trust to sell and convert into money his said real and personal estates, or such parts thereof as should be of a saleable and convertible nature, and to get in the other parts thereof. And he directed his trustees to hold the moneys to arise from such sale, conversion, and getting in upon trust thereout in the first place to pay the expenses incidental to the exercise of the preceding trust and his funeral and testamentary expenses, and to apply one-tenth of his estate over and above

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£110,000 to such charitable institutions and objects as his trustees might determine, and to stand possessed of his residuary real and personal estate until conversion and the surplus of the said moneys, and all his estate after conversion thereof (which was therein referred to as his residuary estate) upon trust to pay the income thereof as follows, viz., one-fifth to his wife *Sarah Piercy* during her life, if she should so long continue his widow, and the remainder equally among all his children and his brother *Robert Piercy* and his sister *Jane Piercy*. And after the decease of his said wife or her second marriage, whichever should first happen, in trust for all the testator's children and his brother *Robert* and his sister *Jane* in equal shares, on the trusts following as to the shares of his children and his brother *Robert*, viz., to stand possessed of one moiety of the share or shares to which any child might be entitled in trust to pay the rents, interest, income, or annual produce of such moiety, without power of anticipation or alienation, to such child for and during his or her life, and after his or her death for all and every his or her child or children who should attain twenty-one, or to such of them as he or she might by deed or will appoint; and if any child should die without issue the moiety to which he or she was entitled should be divided equally amongst the testator's other children, and the children of a deceased child should be entitled to the share to which such deceased child would have been entitled, if living. And the testator directed that his trustees should stand possessed of the share to which his brother *Robert* was entitled upon trust to pay the income thereof to him during his life, without power of anticipation or alienation, and after his decease for all and every of his children or such one or more of them as he should by deed or will appoint. And the testator declared that the share or shares to which any child should be entitled should absolutely vest in such child on the testator's death. And the testator declared that the share or shares belonging to his children being daughters should be for their sole and separate use, and should be settled upon them on marriage: and that his trustees might, at their own discretion, raise any part or parts of the expectant share of any child, not exceeding one-half, for his or her advancement, preferment, or benefit, as his trustees should think fit. And the testator also

declared that his trustees might postpone the sale and conversion of his real and personal estate, or any part thereof, for so long as they should think fit and necessary, and their discretion should not be interfered with, nor proceedings taken by any of the beneficiaries to compel the realization of his estate, until his said trustees should deem it advisable to realize it.

The will contained a direction that all moneys to be invested under it should be invested in "stocks funds or securities of or guaranteed by the Government of the *United Kingdom* or of any British Dependency, or in stock of the *Bank of England*, or the debentures or debenture stock or guaranteed or preference stock of any railway company in *Great Britain* or *India* [of a specified kind], or on real or leasehold security in *England* or *Wales*."

By a codicil dated the 1st of October, 1886, the testator appointed his wife *Sarah Piercy* to be an additional trustee and executor of his will.

The testator left his wife *Sarah* and nine children, and also his brother *Robert* and his sister *Jane*, surviving him.

The order for administration was made on the 21st of January, 1889, upon a summons by three of the trustees and executors as Plaintiffs against the widow and one of the children as Defendants. The administration order was served upon the other persons beneficially entitled under the will. By the order various accounts and inquiries were directed, among them being the following inquiry: "An inquiry what was the testator's estate and interest in lands situate elsewhere than in *England*, and whether such estates passed by the testator's will and were validly devised on the trusts thereof, and, if not, who are entitled to such lands, and for what estates and interests."

The testator was the absolute owner of a large extent of land in *Sardinia*. The opinions of a number of Italian advocates were taken as to the validity and effect under Italian law of the devise contained in the will as regarded land in *Italy*.

The following provisions of the Italian Civil Code were the most material:—

"i. Preliminary directions as to the interpretation and application of the law in general.

"Art. 8. Successions by law or under testamentary disposition,

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whether as regards the order of succession, or as to the measure of the rights of succession, or the intrinsic validity of the disposition, are regulated by the national law of the person whose estate is in question: whatever may be the nature of the property, or in whatever country it may be situated.

"Art. 9. . . . . The substance and effect of testamentary dispositions are regulated by the national law of the persons making them. . . . .

"Art. 12. Notwithstanding the provisions of the preceding articles, in no case shall the laws, acts, or judgments of a foreign country, nor private dispositions or agreements, derogate from the prohibitive laws of the kingdom concerning either the persons, the property, or the acts; nor from the laws in any way concerning public order and morality (*il buon costume*).

"ii. Civil Code.

"Art. 899. Any condition imposed upon an heir or legatee, no matter how expressed, that he is to retain the property, and hand it over to a third party, is a trust substitution. Such substitution is forbidden.

"Art. 900. The invalidity of the trust substitution does not affect the validity of the institution of the heir or legatee, to which it is attached: but it invalidates all the substitutions, even those of the first degree."

This code came into operation in 1866: and made very considerable changes in the laws of *Italy* previously in force as to land.

In 1889 the executors mortgaged a part of the testator's land in *Sardinia* to an Italian bank for £20,000. They afterwards sold other portions of the land. Proceedings were also taken in the Italian Court with reference to the registration of the testator's property in *Italy*, for the purpose of ascertaining the duty to be paid thereon according to Italian law.

At the time when this summons was heard the testator's brother and sister were both dead.

Cozens-Hardy, Q.C., and *F. Thompson*, for the trustees, referred to *Earl Nelson* v. *Lord Bridport* (1).

(1) 8 Beav. 527, 547.

S. Hall, Q.C., and *St. John Clerke*, for the testator's heir-at-law, contended that as regarded the land in *Sardinia* the trusts declared by the will were void *in toto* by Italian law, and that there was an intestacy as to that land, which consequently, in accordance with the Code, devolved on the English heir.

Swinfen Eady, Q.C., and *Badcock*, for the testator's younger children and for the personal representatives of the brother and the sister, contended that under the Italian law the direction to settle the shares of the testator's children and brother was void, and that, subject to the widow's life estate, the children and the brother took absolutely, as also did the sister, under the terms of the will.

Sir *A. T. Watson*, Q.C., and *James Rolt*, for grandchildren of the testator, argued that the provisions of the will were good under Italian law, and that at any rate the trust for sale was valid, and the proceeds of sale must be held upon the trusts declared by the will.

P. M. Walters, for the testator's widow.

1894. Nov. 6. NORTH, J. (after stating the provisions of the will, as to which he said no difficulty could arise with respect to the testator's English property, or property which was to be dealt with according to English law, referred to some of the clauses of the Italian Code and the opinions of the Italian advocates, and to the facts, and continued):—

The question is, What is the position of matters as regards the real estate in *Sardinia*? It is not necessary for me to decide the question whether, under Italian law, the trustees take "as heirs," or whether the testator's children and brother and sister take "as heirs," because *quâcunque viâ* the will is good. If the trustees take as heirs, then everything beyond is "trust substitution," which would not be good according to Italian law, but the gift to the heirs would stand. If, on the other hand, as I think, the trustees are not the heirs, but the testator's children and brother and sister are the heirs, then, in my judgment, according to the preponderating weight of opinion, coupled with the

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evidence derived from what has actually taken place, the trustees have, according to Italian law, a clear power to sell the testator's real estate in *Sardinia* without any interference on the part of the persons beneficially interested in it. Therefore the direction given by the will to the trustees to sell the estate is perfectly good according to Italian law.

Then the next question is, as to the application of the proceeds of sale. With respect to that, in my opinion, the will is perfectly good, because the application of the proceeds is not in any way inconsistent with the Italian law. The Italian law relates to the land: it determines how the land is to go, and regulates the rights of the various persons interested in it. When an absolute sale has taken place, the Italian law still applies to the land in the hands of the then owner or owners; but it has nothing whatever to do with the proceeds of sale, after the land has been placed outside the scope of the will by a disposition which is valid according to Italian law.

Then, as regards the proceeds of sale, is there anything in Italian law which renders it illegal for the testator to do what he has done? The testator has directed that the proceeds of the sale of the land—that is, money to be obtained by the English trustees—is to be received by them, to be invested upon English securities, and then to be held by the trustees upon the trusts declared by an English will in favour of English beneficiaries. No one suggests that there is anything in Italian law forbidding this. It is, indeed, said by one of the Italian advocates that the land is the "patrimony," and that, when the land is sold, the proceeds of sale—the money—is still the "patrimony." What is the law as to that? It depends altogether upon the person to whom the money belongs. No doubt, if the money belongs to an owner who is subject to Italian law, whatever the Italian law forbids as to trusts must be observed, and if any person owning this property is subject to Italian law, and attempts to create a trust which the Italian law forbids, then, according to Italian law, the trust would be void. But when there is an English owner of money arising from the sale of land which belongs to other persons, and is subject in their hands to Italian law, there is nothing in Italian law to make that money itself subject to

Italian law; and therefore, in my opinion, the proceeds of sale, when received by the trustees in pursuance of the valid exercise of the power of sale which they have according to the Italian law, pass entirely by the testator's will: because the disposition is good according to English law, and is in no way at variance with Italian law—meaning now by "Italian law" not merely anything which is expressed in the Italian Code, but anything contrary to "good custom" (whatever that may mean)—for the Italian law does not profess to regulate the disposition of English securities passing under the will of an Englishman to English legatees. In my opinion, therefore, the trust for sale being valid, the application of the proceeds of sale directed by the will is valid also.

Then the only question remaining is this. The trust has not yet been entirely executed, and at the present moment a part of the testator's Italian land remains unsold, and is, therefore, subject to the law of *Italy*. The enjoyment of that land in the meantime, until it has been sold, is not in any way affected by the trust for sale, which has not yet been executed. We must look, therefore, to the Italian law to say what is the right to enjoy the land in the meantime, before the sale has actually taken place. I will take first the case of the testator's widow. It seems to me clear that, according to Italian law, she is a "usufructuary," in the sense that the disposition in her favour for life is perfectly good, and that the gift to the testator's children and brother and sister, subject to that usufruct, is a good disposition.

Then comes the question of the "trust substitution"; and as to that, I come to the conclusion upon the evidence that the property is unconverted during that limited period. The Italian law applying, there can be no "trust substitution," and, that being so, the attempt to settle the shares on the children and the brother is not valid. As regards the sister there is no question, because she takes absolutely in any case. As regards the children, to the extent of one moiety of their shares, and the brother as to the whole of his share, there is an attempt to settle. With the exception of the heir-at-law *Robert Charles Piercy* and the brother (who is dead), none of these persons raise any question.

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According to the Italian law they take absolutely, and the trusts over are ineffectual; but with those two exceptions they all say, "We wish to give effect to the testator's will in this respect; we are desirous that the income of the property until conversion shall, so far as our interests go, be applied in the same way as our shares of the income to arise from the proceeds of the conversion directed by the will will go after the conversion has taken place." There is nothing, in my view, contrary to Italian law in their saying that they wish their shares of the income of the unsold land to be applied in the same way as if they were shares of the income arising from the proceeds of sale after the conversion had taken place. The heir-at-law, however, does not elect or waive any right which he may have, and it is unnecessary for me to decide anything as to his share at present. So long as he lives, and the land remains unsold, he will, of course, be entitled to receive the income of his share, whether the trusts in favour of his children are good or bad, and no question between him and his children, or any other person, can possibly arise. It may be that all the land will be sold during his lifetime, and the question will never arise as between him and his children. But it is possible that he may die while part of the land remains unsold, and the question may then arise between him and his children. Any directions, therefore, which I now give must be without prejudice to any question between *Robert Charles Piercy* on the one hand, and, on the other hand, any person who may claim upon his death to be entitled to his one-eleventh of the income to arise from any part of the Italian property then remaining unsold, until the conversion thereof.

The question as to the brother's share of the income of the unsold land must be left open in the same way: as he has died recently, and although his representatives are before the Court, and bound by my decision on the main questions, they are not prepared to consider or discuss this subordinate question at present: and possibly it may never be raised.

Solicitors: *Field, Roscoe & Co.; Crowders & Vizard; Godden, Son, & Holme.*

W. L. C.

In re KNAPP'S SETTLEMENT. KNAPP *v.* VASSALL.

NORTH. J.
1894
Nov. 7, 8.

[1894 K. 365.]

Voluntary Settlement—Trust for a Class—Period of ascertaining Class.

The rule in *Andrews* v. *Partington* (1) is not confined to wills, but is applicable to a voluntary settlement (and, *semble*, to a settlement for value).

A fund was settled by a voluntary deed upon such trusts as the settlor should appoint, and in default of appointment for such of the younger children of a third person as should attain twenty-one, or being daughters marry:—

Held, that when one younger child attained a vested interest in possession the class was closed, and such child was entitled to be then paid a share.

By an indenture dated the 21st of February, 1867, *Mathew Grenville Samwell Knapp* (being tenant for life in remainder of certain real estates, settled by deed dated the 28th of September, 1866, with power of appointing portions for his younger children), in exercise of such power charged the settled estate with the sum of £6000, payable among his younger children in such manner and at such times as he should appoint, and in default of appointment to be for the portions of such younger children as should attain twenty-one, or being daughters marry with consent, in equal shares, and be vested at their respectively attaining twenty-one, or marrying if daughters, the share of each child to be paid on vesting or the death of the survivor of the tenant for life in possession and *Mathew Grenville Samwell Knapp*, which event should first happen.

By an indenture dated the 30th of August, 1882, made between *Arthur John Knapp*, a voluntary settlor, of the one part, and *R. L. G. Vassall* and *Thomas Parr*, as trustees, of the other part, the settlor covenanted with the trustees that either he or his representatives within twelve months from his death would pay to the trustees a sum of £14,000, with 4 per cent. interest from his death, to be held upon such trusts as he should by deed

(1) 3 Bro. C. C. 401.

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appoint: and in default of appointment, "In trust to divide the same equally among all the children of the said *Mathew Grenville Samwell Knapp*, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, other than and except *John Mathew Knapp*, his eldest son, and such other son or sons, if any, as under the limitations of the said indenture of the 28th day of September, 1866, shall be or become entitled, while under the age of twenty-one years, to the hereditaments, subject to the uses of that indenture as tenant in tail male in possession or in remainder immediately expectant on the decease of the said *Mathew Grenville Samwell Knapp*, to the intent that the said sum of £14,000 shall be in addition to the portions provided for the said younger children by the said indenture of settlement."

That settlement contained a proviso reducing the sums younger children of *Mathew Grenville Samwell Knapp* should take to £2000 in case of there being only one younger child, to £6000 in case of there being only two younger children, and to £10,000 in case of there being only three such younger children; and it was provided that the income of the presumptive share of each infant child of and in the said trust fund should be applicable for his or her maintenance and education under the statutory power in that behalf.

By a disentailing deed dated June, 1889, the real estate subject to the settlement of 1866 was resettled, subject to the charge for portions for younger children, to the use of *Mathew Grenville Samwell Knapp* for life, with remainder to the use of his eldest son, *John Mathew Knapp*, for life, with remainder to his first and other sons in tail male.

Mathew Grenville Samwell Knapp had six children, *John Mathew Knapp*, his eldest son, and five younger children—namely, *Robert Bruce Knapp*, who attained twenty-one in July, 1892; *Catherine Anna Knapp*, who attained twenty-one in May, 1894; and three other children, who were all under age.

Arthur John Knapp, the voluntary settlor, died in 1883, without having exercised his power of appointment under the deed of 1882, and a sum of £14,000 had been duly paid to the

trustees of the settlement of 1882, and invested by them in authorized securities.

The person who was tenant for life in possession in 1867 had since died: but *Mathew Grenville Samwell Knapp* was still living.

By an order made in Chambers on the 8th of August, 1892, on the application of *Robert Bruce Knapp*, it was declared that, under the settlement of August, 1882, *Robert Bruce Knapp* was then entitled to have £2000 out of the £14,000 paid to him, without prejudice to any question, and that he was not then entitled to have any of the income of investments of the £14,000 paid to him, and that the trustees were entitled to pay the income of one-fifth of the investments of the £14,000 for the maintenance of each of the then four infant children. And it was ordered that costs should be paid out of the whole fund.

The value of the trust funds now representing the £14,000, including £2000 paid to *Robert Bruce Knapp* and £700 paid by the trustees for succession duty, exceeded £16,000.

This was an originating summons, to which *Robert Bruce Knapp* and *Catherine Anna Knapp* were Plaintiffs, and the trustees of the settlement and the three youngest children were Defendants. The summons asked for the determination of the following questions: (1.) Whether the Plaintiff, *Robert Bruce Knapp*, was entitled to have a sum of £1000, in addition to the £2000 which had already been paid under the order of August, 1892, subject to succession duty, if any, and with such interest as might be payable. (2.) Whether the Plaintiff, *Catherine Anna Knapp*, was entitled to have now paid her £3000, subject to succession duty, if any, and with interest, if any. (3.) What the right and interests of the Plaintiffs and infant Defendants were in the £14,000.

Swinfen Eady, Q.C., and *Whately*, for the Plaintiffs:—

Where there is a provision for members of a class contingently on their attaining twenty-one simply, any member of that class is entitled, on his attaining twenty-one, to have his share handed over to him, and, to obviate the inconvenience of keeping the

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class open, the Court has laid down the rules that the class from that time cannot be increased, afterborn children being excluded: *Andrews* v. *Partington* (1); *Re Smith* (2); *Gillman* v. *Daunt* (3); *In re Emmet's Estate* (4); *In re Sherwin* (5). It is true that all the cases are cases of wills; but the principle is equally applicable to a settlement—certainly to a voluntary settlement. In the case of a marriage settlement in general there would be no reason to bring the rule into operation, for there would be a life estate in the parent so that there could not be any children born after the first share became payable. Inasmuch as the settlor reserved to himself an overriding power of appointment the settlement is in a similar position to a will.

H. Fellows, for the infant children.

Everitt, Q.C., and *Warrington,* for the trustees:—

There is no case in which the principle relied on by counsel for the children has been applied to a settlement. It seems to be the general opinion of conveyancers that the rule is not applicable to marriage settlements—*Vaizey* on Settlements (6)—though it may be to voluntary settlements.

[NORTH, J.:—I can understand that, if he means that the rule would not usually be called into play in the case of a marriage settlement, because there would be a previous life interest in the parent.]

The rule is one of hardship to the unborn children, and will not be extended. In this case the voluntary settlement is supplemental to the settlement of the realty, and the shares given by the voluntary settlement are to be in addition to the portions under the settlement of the realty. The members of the class to take such portions cannot be ascertained till the death of the tenant for life—a time when the class will be fixed. The settlor must have intended the same rule to apply in fixing the members of the class to take under his bounty as the class to take portions under the previous settlement.

(1) 3 Bro. C. C. 401.
(2) 2 J. & H. 594.
(3) 3 K. & J. 48.
(4) 13 Ch. D. 484.
(5) [1891] 3 Ch. 197.
(6) Page 1093.

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If the settlor had made the provision he did by will, instead of by a voluntary settlement, it is not disputed for a moment what the position of the parties would be. The children who had attained their age of twenty-one years would be entitled to have their shares actually paid over to them. The result would be that the number of shares must be ascertained, and that being so no person who is not alive can have a share set apart for him. That is the effect of the rule in *Andrews* v. *Partington* (1), and many other cases, and it is too clearly settled for there to be any doubt about it at the present time.

There are only two cases I desire to refer to : one *In re Emmet's Estate* (2), referred to in argument, where the principle is stated ; and another by way of illustration of the principle. In *In re Emmet's Estate* the head-note states that the property was limited by a will, on trust to convert, and after payment of debts, &c., to invest, and to permit *H. E.* during his life to receive the rents and income for his own benefit, and after his death, as to one undivided third part, for all the children of *H. E.* equally, the shares to be conveyed and paid to them as they should attain twenty-one, as to sons, and twenty-one or marriage as to daughters. There were clauses of maintenance and accruer. The testator gave another third part of the estates after the death of *H. E.* in favour of the children of his sister, and the remaining third part in trust for all and every the children of *G.*, the shares to be conveyed and paid at the ages and times above mentioned ; and in case *H. E.* the tenant for life should die without children the share given for them was to be divided between his sister's and *G.*'s children, as the two-thirds given to them. *H. E.* died a bachelor. At his death *G.*, a widower, had two children. He married again, and when his eldest child attained twenty-one he had six children, all of whom lived to attain twenty-one. Another child was born afterwards ; and it was held by *Hall*, V.C., and by the Court of Appeal, that the six children, or their legal personal representatives, were entitled to a moiety of the estates. That looks very much like a decision on this exact point; but in fact it was not anything of the kind. The

(1) 3 Bro. C. C. 401. (2) 13 Ch. D. 484.

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question really raised and argued was this, whether the six children took, or whether two of them took, to the exclusion of the other four; and the case of the seventh child seems to have been thought so clear that there was no person to represent that child before the Court at all. It was decided in the absence of that child, and treated as a perfectly clear settled point about which there could be no dispute. There were reasons on the cases for suggesting that it was two instead of six, and that was what was negatived both by the Vice-Chancellor and the Court of Appeal; but the law laid down by Sir *George Jessel* is perfectly clear, in accordance with the earlier cases, and a portion of his statement of the law I must read. He says (1) the will is "as clearly and well drawn as any will need be. Under that will any layman would understand that all the children of *George Nelson Emmet*, at whatever time they were born, would become entitled, and in the absence of authority so should I." That is to say, the words most clearly pointed to all the children. "There has, however, been established a rule of convenience, not founded on any view of the testator's intention, that since when a child wants its share it is convenient that the payment of the share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund. The rule is, that, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, the class shall become incapable of being increased. That rule of convenience, being opposed to the intention, is not to be applied where it is not necessary, there being also a rule that you let in all who are born up to the time when a share becomes payable." I do not think I need read further, because that is a very clear statement of the law with respect to the rule. The result is that you may have to take a testator's death as the time when the class is ascertained; but if there is a life estate which prevents the distribution of the fund till the life estate is over, then you look to the period of distribution, which is, in that case, the determination of the life estate, and then you find, not who the persons who will take are, but you fix the maximum number of which the class can consist, and then divide

(1) 13 Ch. D. 490.

the shares, as far as they are divisible, upon that footing. If there are six children living, one of whom has attained twenty-one, it will get its one-sixth; if another attains twenty-one, it will get its sixth afterwards; if a third dies after twenty-one it does not take a share, and the fund will be divisible in fifths, and the first two who have had their sixth shares would be found entitled each to one-fifth of another sixth, and so on. In the case of a life estate, the period of distribution is usually the death of the tenant for life, but the period of distribution is not necessarily the determination of the life estate. The period at which the fund has to be distributed is the time that actually has to be taken; and in *Watson* v. *Young* (1), before Mr. Justice *Pearson*, the period of distribution was got at in another way. There was in that case a devise upon trust for *J.* for life, and after his death upon trust for his children who should attain twenty-one, and the issue of any child who should die under twenty-one, leaving issue who should attain that age; but, in case there should be no child, nor the issue of any child of *J.* who should attain twenty-one — that is the event that happened — the property was to be held on trust for the child or children of *R.* who should respectively attain twenty-one, if more than one in equal shares. So that *J.* was tenant for life, and on his death without children, according to the usual rule, the class would be fixed; and so it would be if the trust stopped there; but there was a further provision that the rents of the trust premises should, during the term of twenty-one years from the day next before the day of the testator's death, be accumulated by way of compound interest, and the accumulated fund should be held in trust for the child, if only one, or all the children equally, if more than one, of *R.*, who should attain twenty-one. *J.* died without ever having had a child. *R.* had six children who attained twenty-one. The youngest of them was born after the eldest had attained twenty-one, but before the end of the period of accumulation. Although the tenancy for life had expired, a further term had to elapse during which the rents had to be accumulated, and till that period came to an end there could be no distribution, and therefore in that case the

(1) 28 Ch. D. 436.

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period for distribution and fixing the class was not the death of the tenant for life, but the expiration of the further period that had to run to make up the twenty-one years. The learned Judge seemed to think it was a new case, that is to say, a new state of circumstances to which the rule had to be applied, though he had no difficulty in applying the rule to that new state of things.

In the present case the voluntary settlor has given to all the children of *Mathew Grenville Samwell Knapp* who being a son shall attain twenty-one, or being a daughter or daughters shall attain that age or marry. There was no life estate here; and, therefore, if this had been a will, the effect would be perfectly clear, and as soon as any child had attained twenty-one that child would have been entitled to have its share paid to it, and there are various indications in the settlement pointing that way. The income is given for maintenance during minority only, and the shares vest at twenty-one: this is all the more reason for saying that as soon as the child attained twenty-one the time had come when it was entitled to its share when he came and asked for it.

There are two reasons suggested why the general rule should not apply to this case. The first is, that this is not a will but is a voluntary settlement. Now, what difference does that make? I confess I cannot see that it makes any difference. I do not see any logical difference, and I do not see any legal difference. If this gentleman had chosen to make a similar settlement by his will, the matter would have been perfectly clear, and his making the settlement by a deed instead seems to me to come to precisely the same thing. In point of fact, it was as nearly like a will as it could possibly be, because, although he made the settlement, he reserved to himself the general power of appointment over the whole, so that the £14,000 remained in his entire control down to the time of his decease. But neither on legal or logical grounds do I see any distinction between a voluntary settlement and a will. Counsel have told me they could not find (and I certainly do not know of) any case in which the doctrine has been applied to the case of a settlement; but, on the other hand, no one can refer me to any statement in

any case whatever indicating any reason why the rule should not apply to a voluntary settlement—a settlement by a voluntary deed instead of to a settlement by will; and I do not see any distinction between the two. It was suggested that there might have been a distinction if, instead of being a voluntary settlement, the deed had been a settlement for value. I do not quite see what that distinction is; but the case of a settlement for value is not the case that I have to deal with, and therefore about that I say nothing.

The only other ground suggested why the rule in *Andrews* v. *Partington* (1) should not apply was this: There was a settlement by the settlor upon the children of *Mathew Grenville Samwell Knapp*, who already were entitled under a previous settlement—a settlement made some years before—and they were entitled to certain portions of fixed amounts. In this settlement that I have to deal with the trust as to the £14,000 is to divide the same equally among all the children of the said *Mathew Grenville Samwell Knapp* who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, other than and except the said *John Mathew Knapp*, his eldest son. It is said that that clearly points to all the children, and, no doubt, it does. It was as clear here as the Master of the Rolls said the words were in *In re Emmet's Estate* (2); but then the rule of law comes in here, and, although the intention might be to provide for all, this rule of convenience prevents that intention having effect given to it.

But, then, it is said that this made a difference. The provision is not only for all the younger children, but there are these words further on: "To the intent that the said sum of £14,000 shall be in addition to the portions provided for the said younger children by the said indenture of settlement." It was said that that made a difference, because under the original settlement all the children whenever born would take who attained twenty-one, as there was a life estate that must last until the children had all been ascertained by birth, and as all the children therefore were to take under the original settlement, and the shares

(1) 3 Bro. C. C. 401. (2) 13 Ch. D. 484.

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in the £14,000 are to be added to their shares under the former settlement, it must be the intention that all the younger children whenever born should share in the £14,000. That does not make it any clearer that all were to take an addition to the previous gift. Moreover, the reason why they cannot take is, not because it is not the intention that they should take, but because, in spite of the intention, the property has to be divided, inasmuch as the persons who are entitled to absolute shares ask for them, and cannot be gainsaid. Then, further, I do not see that this clause throws any light upon it; because the statement that those who take the £14,000 are to have it in addition to the shares they take under the settlement only means that those who take under both are to have what they take under the second in addition to what they take under the first, and not by way of substitution or satisfaction of the amounts which they take under the first. That phrase does not, therefore, in my opinion, in any way tend to shew that it was the intention that more should take; because the intention already was that all should take, though the intention to carry the gift to a larger number of persons is inconsistent with the right of those who have attained twenty-one to have their shares ascertained and paid to them.

Solicitors for Plaintiffs and infant Defendants: *Roopers & Whately.*

Solicitors for trustees: *Torr & Co.*

D. P.

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Oct. 25.

In re MOODY. WOODROFFE v. MOODY.

[1894 M. 1588.]

Infant—Legacy by Parent to Infant Child—Interest by way of Maintenance—Exception to General Rule—Other Provision by Testator for Maintenance—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43—*Incorporation of Section into Will.*

A legacy by a parent to an infant child carries interest by way of maintenance from the death of the testator, notwithstanding that the will contains a provision for the maintenance of the child out of the income of the legacy, or out of the income of a share of residue given to him equally with the other children.

The provisions of sect. 43 of the *Conveyancing Act*, 1881, as to the maintenance of infant legatees must, for the purpose of determining whether a legacy to an infant child carries interest, be treated as incorporated into any will to which they are applicable.

A testator bequeathed a legacy to his infant son payable at twenty-one, and legacies to his daughters, one of whom was an infant, and gave his residuary real and personal estate to trustees upon trusts in favour of his children equally. He declared that his trustees might at their discretion raise any part not exceeding one moiety of the expectant share of any child, and apply the same for his or her advancement, preferment, or benefit. The will contained no express provision for the maintenance of infant children out of income or otherwise, but the provisions contained in sect. 43 of the *Conveyancing Act*, 1881, were applicable:—

Held, that sect. 43 of the *Conveyancing Act*, 1881, ought to be read as part of the will, but that, though it were so read, yet there was nothing in the will to displace the application of the general rule applicable to legacies to infant children, and accordingly that the legacies to the infant son and daughter respectively carried interest as from the death of the testator.

Adjourned Summons.

Richard Mullins Moody, by his will dated the 4th of February, 1892, appointed *William Woodroffe* and *Joseph Russell* executors and trustees thereof, and after making specific and pecuniary bequests, the testator proceeded as follows: "I bequeath to my son *William Howard John Moody* the sum of £10,000 to be paid to him on his attaining the age of twenty-one years. I bequeath to each of my married daughters, *Ida Hicks*, *Ellen Gray Knight*, *Mary Potter*, *Lily Row*, and *Annie Mugford* the sum of £6000,

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and to each of my unmarried daughters *Kate* and *Theodora* the sum of £7000, and inasmuch as my married daughters have each received a marriage portion on their marriage, I bequeath to each of my two unmarried daughters, if they shall not be married at my decease, the further sum of £500 in lieu of her marriage portion." The testator devised and bequeathed all his real and personal estate not thereby already disposed of unto his trustees upon trusts for sale and conversion as therein mentioned, and out of the proceeds and out of his ready money to pay his funeral and testamentary expenses and debts and the legacies bequeathed by his will or any codicil thereto, and to invest the residue and to stand possessed of the said moneys upon trust for all his children who being sons had attained or should attain the age of twenty-one years, or being daughters had attained or should attain that age, or had married, or should marry under that age in equal shares, and if there should be only one such child, then the whole was to be in trust for that child; and the testator declared that his trustees might at their discretion raise any part or parts not exceeding together one moiety of the expectant share of any child or grandchild under that his will, and apply the same for his or her advancement, preferment, or benefit as his said trustees should think fit. The will contained no express provision for the maintenance of infant children out of income or otherwise.

The testator died on the 9th of July, 1893. He had only the eight children named in the will. Two of these were infants, viz., *Theodora Moody*, who was born on the 27th of February, 1873, and did not therefore attain the age of twenty-one years until the 27th of February, 1894, *i.e.*, nearly eight months after the testator's death; and *William Howard John Moody*, who was born on the 14th of November, 1874, and would not therefore attain the age of twenty-one years until the 14th of November, 1895.

An originating summons was taken out by *William Woodroffe* and *Joseph Russell* (the executors) as Plaintiffs, against *Theodora Moody*, *William Howard John Moody*, and *Mary Potter*, as Defendants, for the determination of the two following questions: First, whether the two several legacies of £7000 and £500

by the will bequeathed to the Defendant *Theodora Moody*, or either of them, carried interest or income as from the 9th of July, 1893 (the date of the testator's death), or from any other date; and secondly, whether the legacy of £10,000 by the will bequeathed to the infant Defendant, *William Howard John Moody*, but to be paid to him on his attaining the age of twenty-one years, carried interest or income as from the 9th of July, 1893, or any other date, and whether such interest or income was applicable for the maintenance, education, or benefit of the said infant.

The summons was adjourned into Court, and now came on for hearing.

Davenport, for the Plaintiffs, stated the case.

Warmington, Q.C., and *R. H. Hodge*, for the Defendants, the infant children:—

We submit that the legacies to the infant children carry interest from the death of the testator. There is nothing in this will to take the case out of the general rule that a legacy by a parent to an infant child carries interest by way of maintenance from the death of the testator. The rule in its origin was based on the ground that the Court would not "presume the father inofficious, or so unnatural, as to leave a child destitute": *Heath* v. *Perry* (1); and see *Beckford* v. *Tobin* (2). But the rule has now become one of construction, and "let the testator give it how he will, either at twenty-one, or at marriage, or payable at twenty-one, or payable at marriage" (see *Heath* v. *Perry*), the Court construes the legacy as carrying interest from the death, unless there is something in the will to negative that construction. The recognised exception is where the testator has designated some other fund out of which the child is to be maintained. This testator has not done that. The provision of sect. 43 of the *Conveyancing Act*, 1881, is a mere power, and even if the will contained such a power in express words it would not be sufficient to displace the right of the child to interest from the death of the testator, or bring the case

(1) 3 Atk. 101. (2) 1 Ves. Sen. 307.

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within the exception. At one time if a testator had by his will designated a sum wholly insufficient for the maintenance of the child it was considered that the general law prevailed, and the legacy did not carry interest until a year from the testator's death. But recently that view has been departed from, and it is clear that where the fund designated is insufficient, the testator is only less inofficious, but he is still inofficious. *Donovan* v. *Needham* (1) will be cited against us, but in that case there was an express direction that the trustees should during minorities pay and advance sums for maintenance.

[KEKEWICH, J.:—*Donovan* v. *Needham* and *Wynch* v. *Wynch* (2), to which Lord *Langdale* refers in *Donovan* v. *Needham*, were not cases in which there was a provision for interest being applied for maintenance out of the legacy. Is there any authority that because there is a provision for maintenance out of the income of the particular legacy, the rule giving interest from the death is displaced?]

We are not aware of any; but it is submitted there is no such provision here. There is no maintenance clause at all, but only an advancement clause.

[KEKEWICH, J.:—That does not touch the question of income.]

[They referred also to *In re Holford* (3), and *In re Jeffery* (4).]

Jason Smith, for the Defendant *Mary Potter* (who was appointed by the Court to represent the other daughters of the testator):—

There is sufficient in this will to take the case out of the ordinary rule giving interest to the infant children, and to bring it within the exception enunciated by *James*, L.J., in *In re George* (5), where "the testator has provided another fund for" the child's "maintenance, so that the income of the legacy is supposed not to be required for the purpose." The law is similarly stated by Sir *George Jessel*, M.R., in *May v. Potter* (6).

Here, independently of sect. 43 of the *Conveyancing Act*, 1881,

(1) 9 Beav. 164.
(2) 1 Cox, 433.
(3) [1894] 3 Ch. 30.
(4) [1891] 1 Ch. 671.
(5) 5 Ch. D. 837, 843.
(6) 25 W. R. 507.

the testator has provided another fund for maintenance by directing that the children's shares of residue may be applied for their "advancement, preferment, or benefit." The word "benefit" is the widest possible, and must include maintenance. The clause is very similar to that in *Donovan* v. *Needham* (1), where a direction that trustees should pay and advance such sums of money as they might think fit for the education, maintenance, and clothing of the children, was held to exclude the general rule.

But further, this will must be read as though sect. 43 of the *Conveyancing Act*, 1881, were incorporated into it, and formed a part of it. *In re Holford* (2) is an authority for that. It follows that there is in this will provision made for the maintenance of infant children, not only out of the legacies given to them, but also out of their shares of residue. Clearly, therefore, there is a fund, other than the legacies, provided by the testator for maintenance. The provision of sect. 43 of the *Conveyancing Act*, 1881, though in the form of a power, really amounts to a trust for the benefit of the infant child.

Moreover, the application of the general rule in this case would plainly defeat the intention of the testator. He has shewn an anxious desire to place all his daughters on a footing of equality, and if the infant daughter is held entitled to interest from the testator's death she will receive more than her sisters.

KEKEWICH, J.:—

The first point with which I will deal is the general one whether the 43rd section of the *Conveyancing Act*, 1881, must for the purposes of decision in this case be read into the will and form a part of it, so that in construing the will I must regard the provisions of the section as being inserted by the draftsman notwithstanding that in fact the words are not written in the will. It seems to me that the proper principle is to regard the section as incorporated in the will. If I am wrong in that, I shall be corrected, though I cannot help saying that I should be sorry if I were corrected, for it does seem to me that it would be an unfortunate thing if draftsmen were obliged to insert in

(1) 9 Beav. 164. (2) [1894] 3 Ch. 30

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wills or other instruments their own provisions for maintenance, because they could not rely on the provision in the Act as being part of the instrument they were settling.

Years before the *Conveyancing Act* of 1881 was passed there was an Act familiar to the lawyers of those days, known as *Lord Cranworth's Act* (23 & 24 Vict. c. 145), and that Act was expressly intituled "An Act to give to trustees, mortgagees and others certain powers now commonly inserted in settlements, mortgages, and wills." There was a recital in *Lord Cranworth's Act* indicating the convenience which would result from a general enactment of common forms. That Act is repealed by the Act of 1881, which, though not intituled in the same way, must I think be taken to have repeated with variations the provisions of *Lord Cranworth's Act*, not only to the same end but for the same purpose, that is to say to prevent repetition and dispense with the necessity of inserting clauses in wills and settlements. I think the proper course is for me to regard sect. 43 of the Act of 1881 as being a paragraph or clause in the particular will which I have to construe, and I proceed to deal with the case on that footing.

The law as regards interest on legacies bequeathed to infants by a parent or person in *loco parentis* is perfectly clear. Mr. *Jason Smith* says that the application of that law to this case will operate rather hardly upon those children who attained their majorities in the testator's lifetime. I do not think that is so. The object of the law, as laid down by Lord *Hardwicke*, is to provide for the maintenance of those infants to maintain whom the testator is either under a legal obligation as parent, or under a moral obligation as having assumed to place himself in *loco parentis*. In either case there is the obligation to provide income for the maintenance of the children who presumably require maintenance, and the fact that if income is provided for the maintenance of the infant child who requires maintenance less is left for another child who does not require maintenance does not seem to me to be a hardship, and cannot alter the application of settled rules of law. Here are two children, one entitled to a legacy of £10,000 on attaining twenty-one, and the other entitled to legacies of £7000 and £500 absolutely, that

is, without attaining twenty-one. There is no express provision for their maintenance unless it is to be found in the clause which follows the residuary gift. All the children take the residue equally, and there is a declaration that the trustees may in their discretion raise any part or parts not exceeding together one moiety of the expectant share of any child and apply the same for his or her advancement, preferment, or benefit as the trustees shall think fit. Cases have frequently occurred where there was no provision for maintenance, but there was a provision, such as is found here, for advancement, preferment, or benefit, and the Court has allowed capital to be taken for education under the words advancement, preferment, or benefit. The difficulty arising from the absence of a provision for maintenance has been got rid of by applying, literally perhaps but still rather broadly, a clause which was not intended to be really a maintenance clause. I have myself, in common with other judges, approved of that course, but I should not therefore call the clause a provision for the maintenance of the children, or regard it as introduced for that purpose. The result is that in this case there is no express provision for maintenance of these infant children out of any fund other than their respective legacies. Then sect. 43 of the Act of 1881, if incorporated here, confers a power to apply for or towards an infant's maintenance the income of the property held in trust for him, that is in this case, the income of the infant's legacy, and I have asked counsel to refer me to any case in which it has been held that a direction to apply the income of the legacy to the maintenance of the child defeats the rule that a legacy given to an infant child by a parent carries interest from the date of the parent's death. No such case has been quoted. I should have been surprised if there had been such a case, for a direction of that kind would seem to point to interest running from the death rather than otherwise.

I must add a few words as to the cases cited. I have before me the report of *Wynch* v. *Wynch* (1) to which I have been referred, because I thought it well to see whether anything more was to be got from that case than is to be found in the statement of it by Lord *Langdale* in *Donovan* v. *Needham* (2), and I do not

(1) 1 Cox, 433. (2) 9 Beav. 164.

KEKEWICH, J. 1894 *In re* Moody. Woodroffe v. Moody.

find that there is anything material beyond what is there said. Then there were the two cases decided by Lord *Hardwicke*; but Mr. *Jason Smith* properly relied, as summing up the law, on the judgment in *In re George* (1). "The rule of law" as was said by the Lord Justice *James* in that case (2) "is well established that a contingent legacy does not carry interest while it is in suspense, except in the case of a legacy by a parent or one standing *in loco parentis* to the legatee; and that exception is subject to another exception, that the rule giving interest to the child does not take effect when the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose." There the Lord Justice is really putting, in his own language, all that is said by Lord *Hardwicke*, Lord *Kenyon*, and Lord *Langdale*. Here I am not dealing with a case of a provision for maintenance out of any other fund, unless one is to be found in the gift of residue. As to that, Mr. *Jason Smith* says these children take the residue subject to the incorporation in the gift to them of the 43rd section of the Act of 1881, and that there is in that way a provision for the maintenance of the children out of the income of the residue. Therefore, he says, there is a provision for their maintenance otherwise than out of the income of the legacies, and therefore the general rule does not apply, but the case falls within the exception to it, because the testator has provided another fund for the maintenance, so that the income of the legacy is not required for the maintenance. No case has been quoted where the other fund has been a share of residue given to the children, and until some case of that kind has been found I should be extremely unwilling to construe that as coming within the exception mentioned by the Lord Justice *James*. A residue is an unascertained amount. It might be quite uncertain what the share of each child would be in the residue, and all the cases, as I understand them, go to this — that you must regard the question with reference to the money given to the child. No doubt in the case of *Wynch* v. *Wynch* (3) before Lord *Kenyon*, and in the case of *Donovan* v. *Needham* (4)

(1) 5 Ch. D. 837.
(2) Ibid. 843.
(3) 1 Cox, 433.
(4) 9 Beav. 164.

before Lord *Langdale*, the provision was for payment out of the general estate; it was, however, not out of a share of residue, but out of the general estate of the testator disposed of by the will. So far as I am aware, this is a novel case. It seems to me that a provision for payment of maintenance to a child out of the income of his share of residue given to him with the other children, does not come within the exception mentioned by the Lord Justice *James* in the case of *In re George* (1), where "the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose." I am aware of no authority the one way or the other on the particular point, and therefore I am obliged to decide it so far as I can on the application of the general rule to the particular facts which arise here, and without the guidance of authority. I think that both the legatees are entitled to maintenance from the testator's death; that is, to interest on their legacies at 4 per cent. so long as the legacies form part of the testator's general estate, and from the time when they are segregated or appropriated the actual interest realized.

Solicitors: *Phelps, Sidgwick, & Biddle; T. Wilkinson; Jennings & Son.*

C. C. M. D.

In re BENDY. WALLIS *v.* BENDY.

[1894 B. 2297.]

Marriage Settlement—Covenant to Settle Wife's other and after-acquired Property—Income—Accumulations—Purchase by Wife during her Coverture—Loan—Charge in Favour of Trustees.

If income not originally included in a covenant in a marriage settlement to settle other and after-acquired property is so invested as to indicate a permanent intention on the part of the owner to turn it into capital, such investment becomes subject to the covenant, provided the terms are sufficiently large to include it as capital.

The same result follows in the case of a sale of capital property not

(1) 5 Ch. D. 843.

KEKEWICH. J. 1894 *In re* BENDY. WALLIS *v.* BENDY.

originally included in the covenant, where the proceeds are laid out in the purchase of other property coming within the terms of the covenant.

Lewis v. *Madocks* (1) discussed.

BY the ante-nuptial settlement, dated the 24th of June, 1890, of *Wilfred Bendy* and *Sarah Barbara Bendy* (then *Wallis*), it was declared that the trustees should stand possessed of certain stocks and securities belonging to the intended wife upon trust, after the marriage, with the consent of the husband and wife or the survivor of them, and after the death of the survivor at the discretion of the trustees, to sell the same and invest the proceeds as therein mentioned, and to pay the income to the wife during her life for her separate use without power of anticipation, and, after her death, to the husband during his life, subject to certain trusts on alienation, and, after the death of the survivor of the husband and wife, upon the usual trusts for the children of the marriage, with an ultimate trust, in default of children attaining a vested interest, if the wife should predecease her husband, for her next of kin according to the statute, as if she had died a spinster. The settlement contained the following covenant: "And it is hereby covenanted, agreed, and declared by and between the parties hereto that if the said *S. B. Wallis* shall at the time of the said now intended marriage be, or if at any time during the said now intended coverture she shall become seized, possessed, or entitled of or to any real or personal property (other than the property hereby specifically settled) for any estate or interest whatsoever in possession, reversion, remainder, or expectancy, except any property of or to which she is at the present time possessed or entitled, and except property of a less value than £200 vesting in possession before or during the said now intended coverture at the same time and from the said source, and except movable chattels or effects of household, domestic, or personal use or ornament, all of which excepted property it is hereby declared shall be and remain the absolute property of the said *S. B. Wallis*, and except also an annuity or annuities or other estate or interest for the life of the said *S. B. Wallis*, or for any term or period determinable upon her death, which it is hereby declared shall belong to the said *S. B. Wallis* as her separate

(1) 8 Ves. 150; 17 Ves. 48.

estate independently of the said *W. Bendy*, and so that she shall not have power to anticipate the same, then and so often as the same shall happen all such real and personal property, except as aforesaid, shall at the cost of the trust estate be forthwith assured or transferred to the trustees or trustee upon trusts as nearly corresponding with the trusts hereby declared of the trust funds hereinbefore settled as may be, and so that such real property shall be impressed with a trust for conversion into money and be settled as personal estate."

At the date of the settlement and of her marriage Mrs. *Bendy* was possessed of or entitled to, in addition to the settled property, (1.) an undivided moiety of a leasehold house in *Camden Road, Islington*, and (2.) seven shares in the *Standard Bank of South Africa*.

In August, 1891, after the marriage, the leasehold house was sold, Mrs. *Bendy's* moiety realizing £425, which was paid to her. In September following she bought £400 6 per cent. debentures of *Wallis & Co., Limited*, paying for them out of a balance of £790 then standing to her credit at her bankers, and made up partly of the £425 and partly of accumulations of income paid to her under the trusts of the settlement.

In February, 1892, Mrs. *Bendy* sold the seven shares in the *Standard Bank of South Africa* for £362, which she paid into her banking account, and shortly afterwards she purchased a leasehold house, No. 18, *Gloucester Road, Finsbury Park*, for £900, of which the greater part was paid with the proceeds of the bank shares and accumulations of income paid to her under the trusts of the settlement, and the balance, £350, was borrowed by her from her bankers. This loan was, it appeared, afterwards repaid partly by her and partly by her husband, but in what proportions there was no evidence to shew.

Mrs. *Bendy* died on the 17th of March, 1894, and her husband took out administration to her estate. There was issue of the marriage one child only, an infant. The main question, raised by an originating summons by the trustees of the settlement (one of whom would be entitled under the settlement as one of the wife's next of kin in default of children) against the husband and child, was whether the debentures and house purchased by

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Mrs. *Bendy* as above mentioned, or which of those properties, were or was within the operation of the covenant to settle her other or after-acquired property.

P. F. S. Stokes, for the Plaintiffs :—

When income is capitalized, as it was here, it becomes subject to a covenant to settle capital : *Lewis* v. *Madocks* (1). Accordingly, the properties purchased by Mrs. *Bendy* should stand subject to a charge in favour of the trustees for the amount of income capitalized.

G. N. Trollope, for the infant Defendant :—

This case is clearly covered by *Lewis* v. *Madocks*. Income, when invested and so converted into capital, becomes subject to such a covenant as this for settlement of other and after-acquired property.

The question is not whether the covenant is too wide for the Court to enforce it as a general covenant to assign all the settlor's property : it is sufficient to say that the Court will enforce it as regards this capitalized income, on the ground that the covenant is divisible : *In re Turcan* (2).

Warmington, *Q.C.*, and *T. D. Munns*, for the Defendant, *W. Bendy* :—

The husband's interest, as his wife's administrator, is to contend that the properties purchased by her are not bound by the covenant and belonged to her absolutely, free from any charge in favour of the trustees.

The moiety of the house in *Camden Road* and the seven bank shares which the lady had at the time of her marriage come within the exception, and the properties purchased with the proceeds of them stand in the same position. The fact that part of the purchase-money came from accumulated arrears of income makes no difference. There is no authority that, where a married woman has invested accumulations of income belonging to her for her separate use, those accumulations come within such a covenant as this. Neither does the fact of the lady having borrowed

(1) 8 Ves. 150; 17 Ves. 48. (2) 40 Ch. D. 5, 9.

money from her bankers to make up the purchase-money give the trustees of the settlement any title under the covenant to the property purchased. In *Lewis* v. *Madocks* (1) and *In re Turcan* (2) the covenant covered the settlor's entire property without any exception, and the Court had to construe it so as to make it reasonable; whereas here there is an exception, the effect of which is to enable the lady to deal with all property belonging to her at the time of the marriage, other than that settled, in the fullest manner. It would be contrary to equity to say that, if she sold such property, the proceeds, or the investments representing it, must be held to go to someone else.

KEKEWICH, J.:—

This is a strange point, and I do not remember ever having to consider it before. As to the construction of the covenant, I have no doubt I ought to construe it grammatically, notwithstanding the language of the exception; that is to say, in my opinion, the exception includes property to which the lady was entitled at the date of the settlement. But as to the other point I must look into the authorities.

1894. Nov. 13. KEKEWICH, J.:—

On the conclusion of the argument I expressed the opinion that the exception from the covenant to settle property of the wife other than that specified must be construed to comprise, that is, to exclude from the operation of the covenant, property to which the wife was entitled at the date of the settlement. There is obviously some blunder, and the result may or may not be what was intended; but I can put no other construction on the words. Therefore, what belonged to the wife at the date of the marriage, not being specifically comprised in the settlement, remained hers unaffected by the covenant. During the coverture she received income for her separate use, and whatever was so received remained separate estate; that is to say, the property of the wife independent of marital control, in whatever form it might from time to time be found. This proposition was not

(1) 8 Ves. 150; 17 Ves. 48. (2) 40 Ch. D. 5.

KEKEWICH, J. 1894 *In re* BENDY. WALLIS *v.* BENDY.

contested in argument, and therefore no authority was cited for it; but authorities would be forthcoming if required.

The question which I have to decide is whether the property thus excepted from the covenant, and the savings of separate estate, have, to any and what extent, been made subject to the covenant by subsequent dealings therewith on the part of the lady. It is one of novelty and difficulty. It may fairly be said to be one of novelty notwithstanding the case of *Lewis* v. *Madocks* (1); for, although that case states and proceeds on a principle with which I will deal presently, it is in many respects very different from this. The essential difference consists in the fact that in *Lewis* v. *Madocks* there was a covenant by a man to settle all his property at any time coming to him, which would include his means of subsistence and means of supporting his wife, so as, from one point of view, to amount to an absurdity; whereas here the covenant binds only the property of a married woman, the settlement of which is not open to a similar objection, and which has always been regarded as the appropriate subject of a covenant of this character. Notwithstanding my trust in the industry of counsel, I hoped that further research would disclose some case giving instruction, by comment or otherwise, respecting *Lewis* v. *Madocks*. I have found many cases in which it was cited, including *In re Turcan* (2), to which reference was made in argument; but in none is there any comment on the principle of *Lewis* v. *Madocks* which I am asked to apply here; and I am equally without any expression of assent to or dissent from it. The principle of *Lewis* v. *Madocks*, so far as it is necessary to consider it for the present purpose, seems to be this, that although a covenant to settle other or after-acquired property (I use a somewhat vague phrase, but one which will readily be understood by lawyers) must be reasonably construed, and therefore will not be held to include such property as cannot be included without defeating the paramount object of the settlement, such as income required for household or other expenses, or, as in this case, money which was obviously intended to be retained or expended at pleasure; yet, if it is once so invested as to indicate a permanent intention on the part of the owner to convert it into

(1) 8 Ves. 150; 17 Ves. 48. (2) 40 Ch. D. 5.

capital, that is to say, to change it from property which is income into property which yields income, then it may reasonably and properly be held to be subject to the covenant, provided of course that the words of the covenant are sufficiently large to cover it. It would be impertinent of me to criticise the decision of the Lord Chancellor in *Lewis* v. *Madocks* (1), but I may venture to say that this has the double advantage of giving an intelligent meaning to a covenant which might otherwise have no legal meaning at all, and of being also consistent with the ordinary habits of prudent men and women.

Whatever questions may arise on matters of detail, there is no great difficulty in applying this principle to the covenant under consideration, relating, as it does, to the property of Mrs. *Bendy* other than that specifically comprised in the marriage settlement. It was not intended that such property should be subject, as it then stood, to the covenant: it was intended that Mrs. *Bendy*, or her husband in her right, should be at liberty to deal with it as property unaffected by settlement. This property, consisting of two items—first, an undivided moiety of a leasehold house, and, secondly, seven shares in the *Standard Bank of South Africa*—was sold by Mrs. *Bendy*, and the proceeds of sale were properly received by her. She has invested these proceeds of sale, together with other money, in the purchase of certain debentures of *Wallis & Co., Limited*, and a leasehold house, No. 18, *Gloucester Road*.

As regards the debentures, the price appears to have been provided to a large extent by the proceeds of sale of the moiety of the leasehold house belonging to her at the date of the settlement, and the balance came out of accumulations of separate income. If I correctly understand the principle of *Lewis* v. *Madocks*, this was such an acquisition of property as to bring the property so acquired within the covenant in the marriage settlement, and it thereupon became subject to the trusts of that settlement.

The position of the second property is not quite so simple. The lady provided a considerable portion of the purchase-money of 18, *Gloucester Road*, out of the proceeds of sale of the shares in

(1) 8 Ves. 150; 17 Ves. 48.

KEKEWICH, J. 1894 *In re* BENDY. WALLIS *v.* BENDY.

the *Standard Bank of South Africa*, and some more from accumulations of separate estate. To that extent, what I have just said respecting the debentures is directly applicable; but these sources were not sufficient to provide the entire purchase-money; and it seems that the balance was borrowed by the lady from her bankers. The circumstances in *Lewis* v. *Madocks* (1) are sufficiently similar to enable me to take that case as a guide here also. I think that the house must be regarded as belonging to the lady—that is, as now forming part of her estate, but subject to a charge in favour of the trustees of the settlement for the amount of the proceeds of sale, accumulations of separate estate, and borrowed money, which I hold to have been devoted by her act to the settlement. It seems that the borrowed money was afterwards repaid; but, as at present advised, I am not sure to what extent it was repaid by her and to what extent by her husband; and if this cannot be cleared up by affidavit (which probably it can be) there must be an inquiry to ascertain the amount for which the trustees of the settlement are entitled to a charge. I hold that charge to include any moneys contributed by the lady towards payment of the loan, but not moneys contributed by the husband.

Solicitors: *Munns & Longden; Dod, Longstaffe, Son, & Fenwick.*

(1) 8 Ves. 150; 17 Ves. 48.

G. I. F. C.

In re HINCHLIFFE, A PERSON OF UNSOUND MIND, DECEASED.

C. A. 1894 Nov. 5.

Practice—Evidence—Affidavit, Exhibit to—Right of Inspection.

Irrespective of any question as to discovery, property, or privilege, if a document is made an exhibit to an affidavit, any person who has the right to inspect and take copies of the affidavit has a similar right as to the exhibit also.

THE deceased lunatic, *Emma Jane Hinchliffe*, was one of three sisters. The other two were sane, and the elder of them was the committee of the lunatic.

Before the death of the lunatic the committee and the sane sister, thinking that a certain person, who was trustee for the three sisters, had dealt improperly with the trust fund, took counsel's opinion on behalf of themselves and of the lunatic, and were advised that proceedings should be taken against the trustee, and that the lunatic should be joined as co-Plaintiff. They then applied in the lunacy for leave to join the lunatic as a co-Plaintiff, and in support of their application the committee made an affidavit, in which she stated that she had taken the opinion of counsel, as she and her sisters were interested in the question of the liability of the trustee; and she further stated in her affidavit that the case and opinion were "annexed hereto and marked with the letters C and D respectively."

Upon that affidavit, which was filed on the 6th of January, 1891, the requisite leave to join the lunatic was given; and an action was subsequently commenced against the trustee by a writ issued on behalf of all the three sisters.

The lunatic afterwards died, and the surviving Plaintiffs added as a Defendant to their action the executor of a will made by her while she was still sane.

The executor then applied in the lunacy, asking that the committee, who had not yet received her final discharge, should hand over to him all the books, papers, and property of the lunatic. The committee accordingly handed over (amongst other papers) an office copy of the affidavit so made by her; but she

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refused to shew the executor the case and opinion referred to therein, upon the ground that they were documents of title, the property, not of the lunatic, but of the committee herself, and that the Defendant ought to make any application for discovery in the action. The executor then applied to the Master in Lunacy for an order that he might be at liberty to inspect and take copies of the case and opinion.

The application was refused by the Master, and his decision was upheld by Lord Justice *Kay*, in Chambers. It was stated that it was not the practice in Lunacy to file with an affidavit the exhibits thereto.

A motion was now made in the matter of the lunacy on behalf of the executor of the deceased lunatic, by way of appeal from the Lord Justice, for an order that the executor might be at liberty to inspect and take copies of the case and opinion.

Henry Terrell, in support of the motion:—

The deceased lunatic was, upon certain evidence, made co-Plaintiff in an action for breach of trust, and she and her estate thereupon became liable to costs. For aught her executor can tell that action was improperly brought, and he is entitled to see the whole of the evidence upon which the order giving leave to join his testatrix was made, so that he may be able to decide what course to adopt in the action, and if necessary to get rid of the liability to costs which is hanging over the estate. The documents which were annexed to the affidavit are not upon the files of the Court; but the committee, by referring to them in that way in the affidavit and making them exhibits thereto, has incorporated them in the affidavit just as much as if they had been written out at length therein.

Willis Bund, for the committee:—

The documents in question are documents of title which are the property of the committee, and they are privileged. The mere fact of the lunatic being joined as co-Plaintiff is not enough to give her representative the right which he claims.

[LORD HERSCHELL, L.C.:—You might have made the lunatic a Defendant; you have chosen to make her a Plaintiff, although

she herself could have no voice in the matter. If she had become sane, would she not be entitled to know on what grounds you joined her? And why should not her representative have the same right?]

The Court has made her a party, and, as she could not repudiate the act of the Court, her representative is not entitled to see these documents. Moreover, any application for discovery ought to have been made in the action, and if so made could not have been successful.

[He referred to *Webster* v. *Whewall* (1).]

[A. L. Smith, L.J., referred to Rules of Supreme Court, 1883, Order xxxi., rule 15.]

This is a question arising in a lunacy.

Lord Herschell, L.C. (after partly stating the facts of the case, continued):—

The joinder of the lunatic as a co-Plaintiff would obviously so far affect her rights as to subject her to liability for the costs of the action. In order to obtain the consent of the master to the application for leave to join her as a Plaintiff, the committee made an affidavit in the lunacy on which the Master granted the leave, and by so doing necessarily affected her rights. The lunatic is now dead, and this affidavit has been handed over by the committee to the executor of the lunatic. The executor being in possession of it, sees that the Court was induced to make the order by the production of the affidavit and the documents annexed to it. He seeks production of those exhibits, and the committee resists on the ground that these documents are documents of title, the property, not of the lunatic, but of the committee, and that they are privileged.

I think that questions of property and of privilege have in reality nothing to do with this application. The documents may be the property of the committee, prepared and taken for her own satisfaction. It may be that, being her property, production of them could not have been ordered in the action. But she chooses to bring them before the Court herself, as part

(1) 15 Ch. D. 120.

C. A. 1894 *In re* HINCHLIFFE, A PERSON OF UNSOUND MIND, DECEASED.

of her affidavit, in order to induce the Court to act in a manner which may affect and may prejudice the lunatic's rights. I cannot, in the absence of authority, see any ground on which the lunatic, if she had become sane, or her executor if she were dead, could be refused inspection of these documents. They form as much part of the affidavit as if they had been actually annexed to and filed with it. For these reasons I think it is impossible to hold that the committee is entitled to refuse to the executor inspection of these documents.

LINDLEY, L.J.:—

I agree. I think that the application for inspection of the case and opinion of counsel, said to be annexed to the affidavit, does not turn upon questions of property or privilege. It is only a matter of convenience that exhibits are not lodged in the Master's office with the affidavit. In my opinion, any one who has a right to see an affidavit has also a right to see an exhibit referred to in the affidavit so as to be made part of it, just as if it were annexed to the affidavit. That is all I need say on the question.

A. L. SMITH, L.J.:—

When a person makes an affidavit, and states therein that he refers to a document marked with the letter A, the effect is just the same as if he had copied it out in the affidavit. It is only made an exhibit to save expense. Therefore any person who is entitled to see the affidavit is equally entitled to see the document referred to therein.

Solicitors: *Frith Needham; Kennedy, Hughes, & Kennedy,* agents for *Colmore & Monckton, Birmingham.*

W. W. K.

Explained. PAYNE *v.* COE. [1950] 2 All E.R. 111.

KEMP *v.* WRIGHT.

C. A. 1894 Nov. 5.

[1894 K. 637.]

Building Society—Instrument of Dissolution—Effect upon Rights of Members——Liability of Advanced Members to pay up forthwith—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 32—*Building Societies Act,* 1894 (57 & 58 *Vict. c.* 47), *s.* 10.

An instrument of dissolution under sect. 32 of the *Building Societies Act,* 1874, is not equivalent in its operation to a winding-up order made by the Court.

Upon such an instrument taking effect, advanced members who have covenanted in accordance with the rules to pay up their advances by instalments cannot be compelled to pay up forthwith the balances due from them on their securities.

The decision of *Kekewich,* J., on this point reversed.

Sect. 10 of the *Building Societies Act,* 1894, applies to a society the dissolution of which was begun before, but was not completed at, the time when that section came into operation.

Brownlie v. *Russell* (1) considered.

APPEAL from part of a decision of Mr. Justice *Kekewich* (2).

The facts of the case are fully given in the report of the hearing in the Court below, and the following concise statement of them will be sufficient for the purpose of the present report.

The society was a terminating building society incorporated under the *Building Societies Act,* 1874, on the 20th of December, 1887.

Its most material rules were shortly as follows :—

By rule 6 it was provided that if it should be deemed expedient to make any alteration, addition, or rescission of or to the rules a general meeting should be convened, and the course to be adopted (except as to certain rules not now in question) should be determined by a majority of those present, and members were to receive seven clear days' notice of any special general meeting. By rule 25 mortgagor members were first to pay the premium (if any) and then to repay the principal by monthly instalments at the rate of £6 per share per annum. And by rule 30

(1) 8 App. Cas. 235. (2) [1894] 2 Ch. 462, 472.

C. A. 1894 KEMP v. WRIGHT.

subscriptions were to be returned in full to withdrawing members in the order in which notice had been given by them.

These rules were never varied in any way by resolution of the members at any special general meeting; but on the 12th of December, 1893, at a duly convened meeting of the members of the society, it was resolved that the affairs of the society should be wound up voluntarily by means of an instrument of dissolution.

By the Act of 1874, s. 32, a society under that Act "may terminate or be dissolved . . . 3. by dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution." The section then specifies what particulars the instrument is to set forth.

By an instrument of dissolution dated the 1st of January, 1894, made pursuant to this section, comprising the particulars thereby specified and signed by the requisite majority, it was agreed and declared (*inter alia*) that for all the purposes of the instrument members who had given notice of withdrawal should have no preference or priority over members who had not given such notice; but there was no clause in the deed which in terms varied the obligations or rights of the advanced members.

It was held by Mr. Justice *Kekewich*, on the 10th of May, 1894, that the rights of the members of the society had been altered by the instrument of dissolution, so that members who had given notice of withdrawal had no longer any priority over members who had not given such notice; this being an alteration of their rights which could have been effected under the rules of the society. And his Lordship also held, upon the authority of *Brownlie* v. *Russell* (1), that the instrument of dissolution operated to make an immediate withdrawal by reason of the compulsion introduced by the winding-up, and that the advanced members could be compelled forthwith to pay up the balances due on their securities.

On the 23rd of August, 1894, the *Building Societies Act*, 1894 (57 & 58 Vict. c. 47), was passed, and that Act in sect. 10 enacted as follows: "Where a society under the *Building Societies*

(1) 8 App. Cas. 235.

Acts is being dissolved or wound up, a member to whom an advance has been made under any mortgage or other security or under the rules of the society, shall not be liable to pay the amount payable under the mortgage or other security or rules, except at the time or times and subject to the conditions therein expressed. This section shall come into operation immediately after the passing of this Act."

The mortgagor members of the society now appealed against the second part of the decision of Mr. Justice *Kekewich*.

Cozens-Hardy, Q.C., and *T. R. Hughes*, for the Appellants:—

Since the hearing in the Court below it has been expressly enacted that where a society like this is being dissolved the mortgagor members shall not be liable to pay up the principal except at the times and subject to the conditions expressed in their mortgages or the rules of the society, that is to say, in the present case, by instalments.

But, independently of this new Act, the mortgagor members have entered into a contract to pay by instalments, and cannot be forced into another contract of a different kind. The instrument of dissolution does not operate as a compulsory withdrawal. There is nothing in it, nor in the 32nd section of the Act of 1874, to vary the obligations entered into by the mortgagor members. *Brownlie* v. *Russell* (1) is no authority upon the present question. The advanced member was the plaintiff in that case, and the question was upon what terms he was entitled to redeem, and not whether he could be forced to pay up at once. Moreover, it was not a case of dissolution, but of winding up. Neither is *Tosh* v. *North British Building Society* (2) in point.

On the other hand, there is authority that a bargain is a bargain and must be kept, and that our contract cannot be altered against our will by a majority of the other members: *Auld* v. *Glasgow Working Men's Building Society* (3); *Scottish Property Investment Company Building Society* v. *Boyd* (4). [They also referred to *Quilter* v. *Mapleson* (5).]

(1) 8 App. Cas. 235.
(2) 11 App. Cas. 489.
(3) 12 App. Cas. 197.
(4) 22 Sc. L. R. 43; 12 Court Sess. Cas. 4th Series, 127.
(5) 9 Q. B. D. 672.

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F. Thompson, for members who had signed the instrument of dissolution:—

An instrument of dissolution operates under the Act of 1874 as a compulsory withdrawal, and the same results flow from it as from a winding-up order: *Brownlie* v. *Russell* (1).

[LORD HERSCHELL, L.C.:—The plaintiff in that case was an advanced member seeking to redeem. He could not, of course, redeem until he had paid up everything he owed on his security; but the Court did not say that he must forthwith pay up everything in a case where he does not seek to redeem. A winding-up order operates as a *vis major*; but a resolution of a majority cannot be called a *vis major*. How can a majority compel a mortgagor member to pay otherwise than according to his contract?

LINDLEY, L.J.:—This is not the case of a compulsory collection of assets.]

Then, upon the other point, this case is not affected by the 10th section of the Act of 1894. That section did not come into operation until eight months after the date of the instrument of dissolution, and the Act ought not to receive a retrospective construction which will make it alter existing vested rights.

LORD HERSCHELL, L.C.:—

With all respect to the learned Judge of the Court below, I am quite unable to agree with the conclusion at which he has arrived. It is not necessary to discuss the question whether the effect of a winding-up order is as extensive as is contended for by the Respondents. This is not the case of a winding-up, but of an instrument of dissolution. By sect. 32 of the Act of 1874 the dissolution of a society may take place with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society. By such consent a society may be dissolved against the will of the minority. In this case the requisite majority have agreed to

(1) 8 App. Cas. 235.

the dissolution of the society. That was purely a matter for the shareholders—a matter in which the majority of the members could bind the minority. What they can bind them to is a dissolution. The instrument of dissolution is to set forth certain matters mentioned in sect. 32, sub-sect. 3. There is no provision further than that for determining the rights of members on a dissolution, and no enactment that their rights should be other than those they enjoy under the rules of the society which created the contract between the members.

The contention is that whereas certain members of the society are advanced members—*i.e.*, members who have obtained advances from the society, and have covenanted to repay those loans, according to the rules, by instalments—upon the dissolution of the company by an instrument of this character the liabilities of those advanced members are immediately altered, and they become bound to pay up their debt, not by instalments, but all at once.

Now, there is nothing in the section to indicate anything of the sort; and there is nothing in the deed itself to shew that this was to be the effect of the instrument of dissolution. But it is contended that, as this would be the effect of a winding-up order when made by the Court, it must therefore also be the effect of an instrument of dissolution, which is the act of the members. That is a consequence which I am not able to follow or to see the force of. A winding-up order is the act of the Court; it is a *vis major*, however it be procured. All the parties have a right to be heard on it, and a minority likely to be affected by the result would be entitled to be heard on the application, and to appeal to the Court in opposition to an order which would benefit one class of members at the expense of another. But is it to be said that where a dissolution is agreed upon by a majority the minority are at their mercy? According to the contention of the Respondents and the judgment of Mr. Justice *Kekewich*, a majority, who might consist entirely of unadvanced members, might dissolve the society and bind the whole of the advanced members to liabilities they had never undertaken. Unless there is distinct authority in favour of that proposition, I should decline to assent to it; it is clearly

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unjust, and I find nothing in the provisions of the Act with reference to the deed of dissolution which supports it. The proposed division of the funds and property of the society is to be set out in the deed, and the liabilities and assets of the society are to be stated in detail. Amongst those assets, and included in the funds and property of the company, would be the liabilities of the members to the society. But there is nothing to affect the covenants in the mortgages, or to indicate that a covenant which was a covenant to pay by instalments is to operate as a covenant to pay immediately. I think, therefore, that the instrument of dissolution did not operate in that way to the prejudice of the advanced members.

The point raised under the new Act of 1894 (57 & 58 Vict. c. 47) is also a good one, although it is perhaps hardly necessary to go into that after the opinion which I have just expressed. The words of sect. 10 are: "Where a society under the *Building Societies Act* is being dissolved or wound up." This society is being dissolved. It cannot be disputed that the words of the section apply to it, and the Legislature expressly says that in such a case an advanced member shall not be liable to pay under the mortgages or the rules of the society, except according to the conditions therein expressed. The only point made against the application of the section was that the legislative enactment came into force eight months after the instrument of dissolution. But this society is not completely dissolved. These advanced members have not yet been compelled to pay; and there is no reason why effect should not be given to the obvious intention of the Legislature. The appeal must be allowed.

LINDLEY, L.J.:—

I am of the same opinion. If a man borrows money and stipulates to repay it by instalments, a majority of the members of his society would obviously have no right under any intelligible principle of law to compel him to pay up the whole sum in one payment. If there is any such right, it must be given by statutory enactment.

It is said that if this were a winding-up under the *Companies Act* of 1862, the borrowing member could be compelled to do so,

and that the Court did this in *Brownlie* v. *Russell* (1). I do not think that *Brownlie* v. *Russell* went so far as that; but if it did, the matter has been put right by the recent Act of 1894. Sect. 32 of the Act of 1874 draws a distinction between dissolution and winding up.

What we are dealing with is a dissolution, and not a winding-up.

There was some misapprehension as to the effect of the decision in *Brownlie* v. *Russell*; but in my opinion, apart from the point under the Act of 1894, the judgment of Mr. Justice *Kekewich* was wrong.

A. L. SMITH, L.J.:—

Mr. Justice *Kekewich* arrived at his conclusion in this case by holding that a deed of dissolution was equivalent to a winding-up order of this Court. There is no authority to suggest that view; but be this as it may, the matter is not worth discussing, for the point under sect. 10 of the *Building Societies Act* of 1894 is conclusive. I read that section as enacting that after the 25th of August, 1894, no matter what any Court may have said about dissolution or winding up—from and after that day, when any society is being dissolved or wound up, no advanced member shall be called upon to pay his debt otherwise than according to his contract.

Solicitors: *Halses & Co.*, agents for *J. F. Read, Liverpool; Alfred Stephenson, Liverpool; R. J. Jones & Co., Liverpool.*

(1) 8 App. Cas. 235.

W. W. K.

C. A.
1894
Nov. 12, 14.

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[1894 B. 17.]

Railway Commissioners—Jurisdiction, whether exclusive—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 6—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *ss.* 9, 10.

The special Act of the Plaintiff company provided, by sect. 23, sub-sect. 1, that the Defendant company should punctually and regularly forward, and afford all reasonable facilities for, goods and mineral traffic destined for or coming from the undertaking of the Plaintiff company, from or to certain specified places, at rates per mile not greater than the lowest rate which should for the time being be charged by the Defendant company for like traffic to or from certain specified docks; and, by sub-sect. 3, that, if at any time, on application made by the Plaintiff company to the Railway Commissioners sitting as arbitrators, the Commissioners should decide that the Defendant company had failed to give any of the facilities therein provided for, and should not, within reasonable time after notice, have remedied such failure, then the Plaintiff company might run over and use with their engines, carriages, &c., certain specified portions of the railways belonging to the Defendant company:—

Held, that, even if sub-sect. 3 applied to a complaint by the Plaintiff company that the Defendant company had been charging rates higher than they were authorized by sub-sect. 1 to charge, it did not confer on the Railway Commissioners an exclusive jurisdiction, and that the ordinary jurisdiction of the Courts was not ousted:

Held, also, that the Commissioners had not in such a case an exclusive jurisdiction by virtue of sect. 9 of the *Railway and Canal Traffic Act*, 1888, and sect. 6 of the *Railway and Canal Traffic Act of* 1854.

THIS was an appeal by the Plaintiffs against a decision of Mr. Justice *Chitty*.

By their statement of claim the Plaintiffs claimed an injunction "to restrain the Defendants from charging for the conveyance of goods and mineral traffic, destined for or coming from the undertaking of the Plaintiffs from or to *Treforest*, or any place northward thereof, rates per mile greater than the lowest rate which the Defendants are and shall from time to time be charging for like traffic to or from the docks at *Cardiff* or *Penarth*, such lowest rate to be ascertained by dividing the gross rate charged by the Defendants for like traffic conveyed by them to or from

any of the docks at *Cardiff* or *Penarth* divided by the distance such traffic is actually conveyed." The Plaintiffs also claimed damages.

The Plaintiffs were incorporated by the *Barry Dock and Railways Act*, 1884. They conveyed goods and mineral traffic to and from their docks situate at *Barry*, in *Glamorganshire*, from and to the points of junction at *Hafod* and *Treforest*, where their railways joined those of the *Taff Vale Company*. The *Taff Vale Company* owned and worked some railways in *Glamorganshire*, and they conveyed goods and mineral traffic to and from various collieries situated on or near their system from and to the several docks at *Cardiff* and *Penarth*, and also all goods and mineral traffic destined to and coming from the undertaking of the Plaintiffs from and to the same collieries between those collieries and the junctions at *Hafod* and *Treforest*. The Plaintiffs had no direct communication by means of any railway of their own with the collieries, all the goods and mineral traffic conveyed by the Plaintiffs going to or coming from the collieries situated at or near the Defendants' system being exchanged with the Defendants at the junctions at *Hafod* and *Treforest*, those junctions being situate on the Defendants' railway between the collieries and the docks at *Cardiff* and *Penarth*. The distance from any particular colliery to the shipping places at the docks at *Barry*, by way of *Hafod* and *Treforest*, was greater than the distance to any of the shipping places at the docks at *Penarth* and *Cardiff*.

By sect. 23 of the *Barry Dock and Railways Act*, 1888 (51 & 52 Vict. c. clxxxii.): "(1.) The *Taff Vale Railway Company* shall punctually and regularly forward, and afford all reasonable facilities for, goods and mineral traffic destined for or coming from the undertaking of the company" (that is, the *Barry Company*) "from or to *Treforest*, or any place northward thereof, at rates per mile not greater than the lowest rate which shall for the time being be charged by the *Taff Vale Railway Company* for like traffic to or from the docks at *Cardiff*, *Penarth*, or *Barry*, and shall deliver all such traffic into, and take the same from, the company's sidings, as regards all traffic coming from or destined for *Hafod*, or any place westward thereof, at *Hafod*, and, as

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regards other traffic, at *Treforest*, without any terminal or other charge in respect thereof, but with such bonus (if any) in respect of traffic exchanged at *Hafod* as, in default of agreement between the *Taff Vale Railway Company* and the company, shall be from time to time determined on the application of either of them by the Railway Commissioners sitting as arbitrators, having regard to all the circumstances of the case and to the following proviso: Provided that, where any such traffic shall be carried on the *Taff Vale Railway* for a less distance than four miles, the *Taff Vale Railway Company* shall be entitled to charge in respect of such traffic as if it were carried on their railway for a distance of four miles, and the company shall in all respects be placed on at least as favourable a footing as any other company with regard to traffic exchanged with the *Taff Vale Railway Company*. . . . (3.) If at any time, on application made by the company to the Railway Commissioners sitting as arbitrators, the said Commissioners shall decide that the *Taff Vale Railway Company* have failed to give any of the facilities herein provided for, and shall not, within reasonable time after notice, have remedied such failure . . . . then the company" (that is, the *Barry Company*) "may run over and use with their engines, carriages, and waggons, and officers and servants, whether in charge of any engines or trains, or for other purposes, and for the purposes of their traffic of every description, the railways and stations following—that is to say, so much of the railways belonging to or leased or worked by the *Taff Vale Railway Company* as is situate to the northward or westward of the termination of Railway No. 7 authorized by the Act of 1884; together with all stations, &c., on the said portions of railway . . . . provided always that, if and whenever the company shall exercise the running powers by this section conferred, the *Taff Vale Railway Company* shall, during the period of such exercise, be relieved and discharged from any obligation under this section to deliver traffic to the company at *Hafod* or *Treforest*."

The Plaintiffs alleged that, notwithstanding sect. 23, the Defendants had charged, and were continuing to charge, rates per mile for the conveyance of goods and mineral traffic destined for and coming from the undertaking of the Plaintiffs between

the points of junction at *Hafod* and *Treforest* and the collieries, greater than the lowest rate per mile which they had from time to time charged, and were still charging, for like traffic conveyed by them to and from the collieries from and to the docks at *Cardiff* and *Penarth*, and the Plaintiffs alleged that in this way they had suffered, and were suffering, great damage.

The Defendants by their defence denied that they had in fact violated the provisions of sect. 23 as to rates. The Defendants also insisted that if there had been any breach of sect. 23, the only remedy available to the Plaintiffs was provided by that section.

The Defendants, moreover, submitted that, both by reason of sect. 23, and also by the *Railway and Canal Traffic Act*, 1888, the Railway and Canal Commissioners alone had jurisdiction to deal with or give any remedy for any alleged breach of sect. 23, and that the Court had no jurisdiction to entertain the action, or to give any of the relief which the Plaintiffs claimed. Mr. Justice *Chitty*, without expressing any independent opinion of his own, but following a decision of Mr. Justice *Day* in *Taff Vale Railway Company* v. *Davis*, gave judgment for the Defendants.

The decision of Mr. Justice *Day* was affirmed by the Court of Appeal (1), though on a different ground.

Sir *R. E. Webster*, Q.C., *Moulton*, Q.C., and *Joseph Shaw*, for the Plaintiffs, after contending that the Respondents had, in fact, charged rates higher than they were entitled to charge under sect. 23 of the *Barry Dock and Railway Act*, 1888, continued:—

Then it is said, on behalf of the Respondents, that, if we have any case which entitles us to relief, we have sought our relief in the wrong tribunal, because the section which imposes the obligation on them also provides the remedy, and the only remedy, for its non-fulfilment. And they contend that the jurisdiction of this Court is ousted, and that the Railway Commissioners are the proper and only tribunal.

But sect. 23 does not cover our case, and the general jurisdiction of the Court remains open to us.

They have forwarded our goods, and they have afforded

(1) [1894] 1 Q. B. 43.

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"reasonable facilities" for our traffic; but they have failed and decline to forward the goods at rates "per mile not greater than the lowest rate" specified in the section; and our right is damages for their having done this in the past, and an injunction to restrain them for the future. So that if we went to the Commissioners we should not get our full remedy. The remedy given by sub-sect. 3 of sect. 23 only arises when, on application to the Commissioners by us, they shall decide that the Respondents "have failed to give any of the facilities herein provided for." A rate is not a "facility," and the making of an excessive rate is not a breach of an obligation to "afford all reasonable facilities": *Great Western Railway Company* v. *Railway Commissioners* (1); *Reg.* v. *Railway Commissioners* (2).

This is a case in which several obligations are imposed by the Legislature, and a subsequent remedy is supplied which is only applicable to some of them; so the jurisdiction of the Court is not ousted, and an action is maintainable by a person aggrieved: *Guardians of Holborn Union* v. *Vestry of St Leonard's, Shoreditch* (3); *Atkinson* v. *Newcastle and Gateshead Waterworks Company* (4).

Again, the remedy given by sub-sect. 3 of sect. 23 is not only not exclusive, but it is merely optional. The jurisdiction of the Railway Commissioners is merely an administrative jurisdiction; and there is nothing here like a reference of all questions between the parties to arbitration: *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company* (5).

[They also referred to *Phipps* v. *London and North-Western Railway Company* (6).]

Balfour Browne, Q.C., and *W. J. Noble*, for the Respondents:—

The remedy is given and the penalty is fixed by the 23rd section of the *Barry Company's* Act of 1888. This is, in fact, an arbitration clause in an Act of Parliament which ousts the jurisdiction of the ordinary Courts, and sends the parties to the Railway Commissioners: *Watford and Rickmansworth Railway*

(1) 7 Q. B. D. 182.
(2) 22 Q. B. D. 642.
(3) 2 Q. B. D. 145.
(4) Law Rep. 6 Ex. 404; 2 Ex. D. 441.
(5) Law Rep. 2 H. L., Sc. 347.
(6) [1892] 2 Q. B. 229.

Company v. *London and North-Western Railway Company* (1). But, even if we are wrong in this contention, it is submitted that the jurisdiction of the Court is ousted by sect. 9 of the *Railway and Canal Traffic Act*, 1888 (51 & 52 Vict. c. 25) (2).

(1) Law Rep. 8 Eq. 231.

(2) Sect. 9: "Where any enactment in a special Act—

"(*a*) contains provisions relating to traffic facilities, undue preference, or other matters mentioned in sect. 2 of the *Railway and Canal Traffic Act*, 1854, or

"(*b*) requires a company to which this part of this Act applies to provide any station, road, or other similar work for public accommodation, or

"(*c*) otherwise imposes on a company to which this part of this Act applies any obligation in favour of the public or any individual,

" or where any Act contains provisions relating to private branch railways or private sidings, the Commissioners shall have the like jurisdiction to hear and determine a complaint of a contravention of the enactment as the Commissioners have to hear and determine a complaint of a contravention of sect. 2 of the *Railway and Canal Traffic Act*, 1854, as amended by subsequent Acts."

Sect. 10: "Where any question or dispute arises, involving the legality of any toll, rate, or charge, or portion of a toll, rate, or charge, charged or sought to be charged for merchandize traffic by a company to which this part of this Act applies, the Commissioners shall have jurisdiction to hear and determine the same, and to enforce payment of such toll, rate, or charge, or so much thereof as the Commissioners decide to be legal."

Sect. 12: "Where the Commissioners have jurisdiction to hear and determine any matter, they may, in addition to or in substitution for any other relief, award to any complaining party who is aggrieved such damages as they find him to have sustained; and such award of damages shall be in complete satisfaction of any claim for damages, including repayment of overcharges, which, but for this Act, such party would have had by reason of the matter of complaint.

"Provided that such damages shall not be awarded unless complaint has been made to the Commissioners within one year from the discovery by the party aggrieved of the matter complained of.

"The Commissioners may ascertain the amount of such damages either by trial before themselves, or by directing an inquiry to be taken before one or more of themselves or before some officer of their Court."

[This Act received the Royal Assent on the 10th of August, 1888, and came into operation on the 1st of January, 1889.

The *Barry Company's* Act of 1888 received the Royal Assent on the 7th of August, 1888, and came into operation immediately.]

By the *Railway and Canal Traffic Act*, 1854 (17 & 18 Vict. c. 31), s. 6, "No proceeding shall be taken for any violation or contravention of the above enactments, except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal or railway and canal company under the existing law."

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Sect. 9 gives the Commissioners in such a case as the present "the like jurisdiction" as they had under sect. 6 of the Act of 1854, *i.e.*, an exclusive jurisdiction.

And now, by sect. 12 of the Act of 1888, the Commissioners have the power to award damages, "including repayment of over-charges."

Sect. 23 of the *Barry Company's* Act was in effect a private bargain between the two companies, and sub-sect. 3 contains the sole remedy which the Legislature intended that the Plaintiffs should have for a breach of the obligations imposed on the Defendants by sub-sect. 1. If the Plaintiffs obtain running powers over the Defendants' lines, they have all the remedy they require: *Atkinson* v. *Newcastle and Gateshead Waterworks Company* (1).

[LORD HERSCHELL, L.C.:—The particular remedy is given if the aggrieved company choose to make use of it.]

There is not only an agreement to refer to arbitration, but the precise remedy to be given is prescribed. In effect, the Legislature have given the Plaintiffs running powers over our lines, those powers being suspended so long as we do certain specified things. If we fail to do those things the running powers come into operation.

[LORD HERSCHELL, L.C.:—At the time when the *Barry Company's* Act of 1888 was passed the Railway Commissioners had not power to give damages. The general Act of 1888 was passed after the *Barry Company's* Act of that year.]

"Facilities" in sub-sect. 3 of sect. 23 includes the charging of the rates mentioned in sub-sect. 1. A "through rate" is a "facility": *Railway and Canal Traffic Act*, 1888, s. 25. Sect. 23 is really aimed at the charging of through rates. The decision in *Great Western Railway Company* v. *Railway Commissioners* (2) is really in favour of the Defendants.

On the true construction of sect. 23, sub-sect. 1, the Defendants have not been charging rates higher than they are authorized to charge.

Sir *R. E. Webster*, in reply:—

There is nothing in the special Act or in the general Act

(1) Law Rep. 6 Ex. 404; 2 Ex. D. 441. (2) 7 Q. B. D. 182.

which ousts the jurisdiction of the Court in such a case as the present. Sect. 10 of the *Railway and Canal Traffic Act*, 1888, only gives the Commissioners concurrent jurisdiction. An action can be brought to recover an excessive charge: *Pryce* v. *Monmouthshire Canal and Railway Companies* (1); *London and North Western Railway Company* v. *Evershed* (2). Sect. 12, though it empowers the Commissioners to award damages, provides that damages shall not be awarded unless complaint has been made within a year from the discovery by the party aggrieved of the matter complained of; so that the jurisdiction of the Commissioners is not so wide as that of the Court. The question of excessive rates is quite distinct from that of "facilities," and the provision in sub-sect. 3 of sect. 23 as to failure to remedy "within reasonable time after notice" is not applicable to an excessive rate. By sect. 23 the right to apply to the Commissioners is only optional.

[The following authorities were also referred to: *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Denaby Main Colliery Company* (3); *Lancashire and Yorkshire Railway Company* v. *Greenwood* (4); *Rhymney Railway Company* v. *Rhymney Iron Company* (5).]

LORD HERSCHELL, L.C. (after deciding that the Defendants had been, in fact, charging higher rates than they were authorized by sect. 23 to charge, continued):—

But it is said that, even if the Plaintiffs' construction of sect. 23 is well founded, they are not entitled to come to this Court for relief; that the obligation was imposed by the Legislature by sub-sect. 1 of sect. 23; that sub-sect. 3 provides a remedy if the obligation is not fulfilled; that, providing such a remedy, it contains the only remedy for the breach of the obligation; and that the jurisdiction of the Court is ousted, even if the Plaintiffs establish that their rights have been violated. This, of course, turns upon the construction of sub-sect. 3. It cannot be disputed that, when rights are acquired under a statutory provision, which

(1) 4 App. Cas. 197.
(2) 3 App. Cas. 1029.
(3) 13 Q. B. D. 674; 14 Q. B. D. 209; 11 App. Cas. 97.
(4) 21 Q. B. D. 215.
(5) 25 Q. B. D. 146.

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also gives a remedy for the violation of those rights, the Legislature may so frame the enactment as to limit the remedy for the violation of the rights to the remedy so given. It is a matter of construction in each case whether that is what the Legislature has done. Of course, if it were clear that the remedy given would not be applicable to all cases, it would be impossible to suppose that the Legislature, while giving a right, had left that right to be violated with impunity. Therefore, unless sub-sect. 3 covers such a case as that with which we are now dealing, it is clear that the jurisdiction of the Court must remain. [His Lordship read sub-sect. 3, and continued:—]

The first question is: Do the words "have failed to give any of the facilities herein provided for" cover such a case as that which we are now considering, where no complaint is made about anything in connection with the carriage of goods, except that a higher rate has been charged than under the statute the Defendants were justified in charging? I own that upon that point I feel considerable difficulty. The language of sub-sect. 1 is, that they shall afford all reasonable facilities for traffic at given rates—rates as certain as if they had been fixed in money—and without any terminal or other charge. But can it be said that when in sub-sect. 3 the language used is merely "have failed to give any of the facilities herein provided for," those words cover the making of a charge at a rate higher than that which is prescribed in sub-sect. 1, or the making of a terminal or other charge? If that had been intended one would certainly have expected (and reasonably good drafting would have required) that the language of the 3rd sub-section would have been different. When you find the rates and the terminal and other charges specifically mentioned in sub-sect. 1, and in sub-sect. 3 you find only the words "fail to give any of the facilities," this difference in language unquestionably suggests that the scope of sub-sect. 3 is less wide than has been contended by the Respondents, and still more so when you see that the right given by sub-sect. 3 is to arise only when the *Taff Vale Company*, having failed in fulfilling their obligation, shall not, within a reasonable time after notice, have remedied the failure.

But I do not think it necessary to rest my decision upon this

ground, although I confess that I entertain considerable doubts whether this case falls within the scope of sub-sect. 3. Nor should I think it extraordinary that such a case should be designedly omitted from sub-sect. 3, because a question of excessive charge of that kind is a matter which may be very easily and readily settled. It is the simplest possible question of fact, and there are such simple modes of remedying it that one would hardly be surprised if the Legislature had not provided a special tribunal of arbitration for the determination of such questions. But, even supposing this matter to be within sub-sect 3, the question still arises whether it was intended that the only remedy of the party aggrieved should be by a resort to that special tribunal, or whether the ordinary remedies which the law would have provided, if there had been no power to resort to that special tribunal, are still open to him. In determining that question we must, of course, be guided very much by the language used in sub-sect. 3. It does not contain a reference of such questions to arbitration. If it had, *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company* (1) and other cases cited might have been applicable. But sub-sect. 3 does not provide that any such dispute shall be referred to arbitration; it merely says that if at any time, on application by the *Barry Company* to the Railway Commissioners sitting as arbitrators, the Commissioners shall decide that the *Taff Vale Company* have failed to give facilities, and shall not, within reasonable time after notice, have remedied the failure, certain consequences shall follow. It makes it in express terms, as clearly as a thing could be made, merely optional on the part of the aggrieved party, the *Barry Company*, to adopt that particular remedy, and I cannot come to the conclusion that there is anything in sub-sect. 3 to oust the ordinary jurisdiction of the Courts to entertain the complaint of a party who is aggrieved by a distinct breach and violation of the provisions of sub-sect. 1 of sect. 23.

Then it was said that the *Railway and Canal Traffic Act*, 1888, has at all events now conferred exclusive jurisdiction in this matter upon the Railway Commissioners. That Act was not

(1) Law Rep. 2 H. L., Sc. 347.

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passed until after, and did not come into operation until some months after, the passing of the *Barry Company's* Act of 1888, and it would not, I think, be in accordance with sound principles to look at the *Railway and Canal Traffic Act*, 1888, for the purpose of construing sub-sect. 3 in the *Barry Company's* Act. It was said, and I admit that the argument has force, that under sub-sect. 3 the Commissioners have no power to award damages, and that the aggrieved company must wait a reasonable time before they could obtain any remedy, and that during that reasonable time the contract with them would have continued to be violated, and they would have been still sustaining injury. That argument was used for the purpose of shewing that sub-sect. 3 could not have been intended to oust the jurisdiction of the Court. To this it was answered, that the Railway Commissioners have now, under the Act of 1888, jurisdiction to give damages. But, as I have already said, the *Barry Company's Act* of 1888 must be construed, as it would have been construed on the day it was passed, without reference to the public Act which was passed and came into operation later. Then it was said that the public Act of 1888, by reason of the provision in the special Act as to facilities, gives the Railway Commissioners exclusive jurisdiction. There are two observations to be made upon that. In the first place, sect. 10 of the public Act appears to treat a dispute as to a toll, or a rate, or a charge as something different from a dispute as to facilities, which is dealt with by sect. 9; and in the next place, sect. 9 does not in terms provide that the Commissioners shall have exclusive jurisdiction. It provides that they shall have the like jurisdiction to hear and determine a complaint of a contravention of the enactment as they have to hear and determine a complaint of a contravention of sect. 2 of the *Railway and Canal Traffic Act*, 1854. It only gives the Commissioners the like jurisdiction as in the case of a complaint of a contravention of sect. 2. The only provision giving exclusive jurisdiction to the Commissioners to be found in the *Railway Act* of 1854 is in sect. 6, and that section only provides that the jurisdiction shall be exclusive in any proceeding "for any violation or contravention of the above enactments." Now, it seems to me impossible to enlarge sect. 6 of the Act of 1854 so

as to make it apply not only to those enactments to which it in terms applies, but also to later enactments. Probably as to most or many of the matters mentioned in sect. 9, the Railway Commissioners would have exclusive jurisdiction, because they are matters in which no other Court had or would have jurisdiction at common law. That may be so, just as it has been held that under the *Railway and Canal Traffic Act*, 1888, there is no right of action at common law, and that the only remedy is before the Commissioners. But it seems to me impossible to say that, if at the time when it was passed sub-sect. 3 of sect. 23 did not make the jurisdiction of the Railway Commissioners exclusive in the matter with which we are dealing, that effect has been produced by the public Act which was passed at a later period in the same year. For these reasons, I think that the Court has jurisdiction.

LINDLEY, L.J.:—

I am of the same opinion. Mr. Justice *Chitty's* judgment simply followed that of Mr. Justice *Day*, who expressed an opinion that these Plaintiffs had misconceived their remedy, and that if any remedy existed it should have been sought by means of an application by the *Barry Company* to the Railway Commissioners. This I take to be an indication that, in the opinion of that learned Judge, a dispute of this kind cannot be settled by an action at law, but must be settled by proceedings before the Railway Commissioners.

I cannot, however, read sect. 23 of the *Barry Act* of 1888 as excluding the jurisdiction of any Court of Law. Whether the expression in sub-sect. 3, "facilities herein provided for," includes the granting of facilities at the rate before mentioned, or whether it is confined to facilities apart from the rate, is by no means an easy question to answer; but I will assume that "the facilities herein provided for" does include facilities at the rate before mentioned. Still, in order to support Mr. *Balfour Browne's* argument, we must find something which excludes the jurisdiction of the Court; and I cannot find anything approaching that. There is no agreement to refer to arbitration; there is no obligation to go to the Commissioners; there is merely an option

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given to one of the parties to this statutory agreement to go before the Commissioners, if they choose to do so. If they do not choose, they are not obliged to go; and before it can be said that an Act of Parliament prevents a person who is aggrieved from having recourse to the ordinary remedies which are open to the subjects of the realm in general, you must find some negative words, or some clear and distinct enactment to that effect. Construe the words as you will, you cannot find anything like that in them. This, as it appears to me, is the answer to the argument that the Plaintiffs have misconceived their remedy. [His Lordship then expressed his concurrence with the view of the Lord Chancellor that, upon the true construction of sect. 23, the Defendants had been charging higher rates than they were authorized by that section to charge.]

A. L. SMITH, L.J.:—

Upon the first point, viz., whether an application to a Court of Law can now be maintained, it seems to me that it clearly can. It is not disputed that, prior to the passing of the *Barry Act* of 1888, if a person or a company had complained, as the *Barry Company* are now complaining, that excessive rates had been charged by and paid to the Defendants, an action at law would have lain to recover the excess, and the question is, whether in sub-sect. 3 of sect. 23 of that Act there is to be found an indication that the action at law which the *Barry Company* might previously have maintained is now excluded, and that they are driven to an application to the Railway Commissioners, whether sitting as arbitrators or not. Sub-sect. 3 does no more than provide that the *Barry Company*, having a right of action, as they undoubtedly had when that sub-section was passed, might, if they chose, make an application to the Railway Commissioners and obtain the benefit of their jurisdiction. To say that that provision ousts the jurisdiction of the Court is, in my judgment, not accurate.

[His Lordship concurred with the other members of the Court upon the construction of sub-sect. 1 of sect. 23.]

Solicitors: *Downing, Holman & Co.*, agents for *Downing & Handcock, Cardiff; Ince, Colt, & Ince*, agents for *Ingledew & Sons, Cardiff.*

W. L. C.

PRESTON BANKING COMPANY *v.* WILLIAM ALLSUP & SONS.

C. A. 1894 Dec. 7.

[1894 P. 4.]

Practice—Order of Court—Rehearing—Misrepresentation—Jurisdiction.

The Court has no jurisdiction to rehear or alter an order after it has been passed and entered, provided that it accurately expresses the intention of the Court.

An application was made in an action that certain costs which the Applicant had by a previous order in the action been directed to pay might be made costs in the action, and for a stay of proceedings under the order on the ground that the order had been obtained by misrepresentation:—

Held (affirming the decision of the Vice-Chancellor of the County Palatine of *Lancaster*), that this was in effect an application to rehear the previous order, and that the Court had no jurisdiction to entertain it.

Staniar v. *Evans* (1) observed upon.

THIS was an appeal from a decision of the Vice-Chancellor of the County Palatine of *Lancaster*.

By an order made in a debenture-holders' action, *F. L. Lindsay* was appointed receiver and manager jointly with *D. W. Allsup* of the real and personal property of the Defendant company comprised in three series of debentures. He was also the holder of a debenture of the third series for £1000.

By an order of the 4th of June, 1894, the Vice-Chancellor directed the sale of the business and assets of the Defendant company out of Court. *Lindsay* subsequently applied in the action that the sale might be carried out under the direction of the Court.

By an order of the 11th of July, 1894, made upon this application, it was ordered that upon the Applicant paying £250 into Court within a week as security for the costs and damages of and consequent upon the application, it should be referred to the Registrar to appoint some fit and proper person to conduct the sale out of Court, provided that upon default being made in payment of the £250 no order should be made upon the application

(1) 34 Ch. D. 470.

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except that the Applicant should pay the costs of it. *Lindsay*, having made default in paying the £250, applied by summons in the action that, notwithstanding the order of the 11th of July, the costs thereby directed to be paid by him might be costs in the action, and that all further proceedings under that order might be stayed. At the date of this application the assets of the Defendant company had been sold at a price which left a considerable sum for distribution amongst the third debenture-holders, and the ground of the application was that the order of the 11th of July had been obtained by a misrepresentation as to the value of such assets. The application was made after the order of the 11th of July had been passed and entered.

The Vice-Chancellor held that he had no jurisdiction to entertain the application. *Lindsay* appealed.

Hopkinson, Q.C., and *T. E. Mansfield*, for the Appellant:—

For the purposes of the present question there is no difference between the Palatine Rules and the Rules of the Supreme Court. If it can be proved that the Vice-Chancellor has been misled into making an order which he would not have made had he known all the facts, then he has jurisdiction to correct the order: *Staniar* v. *Evans* (1).

[LORD HALSBURY:—The second ground of decision in that case appears to establish your proposition.]

In re Roper (2); *Nicholson* v. *Norton* (3).

[LORD HALSBURY:—In those cases the order was not intended to be final.]

The same observation applies to the present case.

[A. L. SMITH, L.J.:—*In re Suffield and Watts* (4) shews that a Judge has no jurisdiction to alter an order after it has been passed and entered.]

It has been held that where an order has been passed and entered, and the record does not express the intention of the Court, it may be altered. And again, an order has been corrected

(1) 34 Ch. D. 470.
(2) 45 Ch. D. 126.
(3) 7 Beav. 67.
(4) 20 Q. B. D. 693.

by including in it the costs of an interlocutory proceeding although the Court had at the time when it gave its decision no intention in the matter, it not having been brought to the notice of the Court: *Blakey* v. *Hall* (1).

[LORD HALSBURY:—In *Flower* v. *Lloyd* (2) it was held that the Court had no jurisdiction to rehear an appeal although the judgment had been obtained by fraud.]

The summons ought to have asked for a supplemental order to enable the Applicant to take his costs out of the surplus moneys; but the Court will not dismiss the summons because it is not framed in the best form.

Astbury, for *Allsup* and the Defendant company.

Humber, for the Plaintiffs.

LORD HALSBURY:—

I am of opinion that this appeal should be dismissed. If by mistake or otherwise an order has been drawn up which does not express the intention of the Court, the Court must always have jurisdiction to correct it. But this is an application to the Vice-Chancellor in effect to rehear an order which he intended to make, but which, it is said, he ought not to have made. Even when an order has been obtained by fraud, it has been held that the Court has no jurisdiction to rehear it. If such a jurisdiction existed it would be most mischievous. The fact that in the present case the application to rehear is made to the particular Judge who made the order is immaterial; for if one Judge can rehear the order another can. Any application which may be made to the Vice-Chancellor for an order in the nature of a supplemental order is, of course, still within his jurisdiction; but he has no jurisdiction to rehear or alter this order.

LINDLEY, L.J.:—

I am of the same opinion.

This is a matter of some importance as to the practice and procedure of the Court. This is not an application to alter an

(1) 35 W. R. 592. (2) 6 Ch. D. 297.

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order on the ground of some slip or oversight. Nor is it a case in which the order has not been drawn up. Here the order has been drawn up, and it expresses the real decision of the Court; and that being so, the Court has no jurisdiction to alter it. If this summons had proceeded on the theory that the order of the 11th of July was right, and that circumstances had since occurred which had rendered a supplemental order necessary, the Court might have entertained the application; but this summons proceeds on the theory that the order of the 11th of July is wrong. In my opinion, it is of the utmost importance, in order that there may be some finality in litigation, that when once the order has been completed it should not be liable to review by the Judge who made it. This appeal must be dismissed with costs, but without prejudice to any application which the Appellant may make to the Vice-Chancellor for leave to take the costs which he has been ordered to pay out of the proceeds of the sale of the company's assets.

A. L. SMITH, L.J.:—

I am of opinion that the Vice-Chancellor was right in arriving at the conclusion that he had no jurisdiction. This is not an application to rehear a matter before the order has been drawn up and perfected. Nor is it an application to vary an order which has been drawn up not in accordance with the order pronounced by the Judge. Nor is it an application that the Judge should make an order supplemental to the order drawn up; but it is an application that he should rehear the order made and perfected, and make another in its place. In my opinion, the Judge had no jurisdiction to do this, though in the three former cases he might have done so. It was said that Mr. Justice *North* had decided the contrary in *Staniar* v. *Evans* (1). At the date of that decision *In re Suffield and Watts* (2) had not been decided by this Court, and the case of *In re St. Nazaire Company* (3) was not brought to the notice of the learned Judge. *Staniar* v. *Evans* is not now before the Court. If it were, in my judgment, it would require reconsideration. Lord Justice *Fry* put the law on the

(1) 34 Ch. D. 470. (2) 20 Q. B. D. 693.
(3) 12 Ch. D. 88.

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right foundation when he held, in *In re Suffield and Watts* (1), that so long as the order has not been perfected, the Judge has a power of reviewing the matter, but when once the order has been completed the jurisdiction of the Judge over it has come to an end. The learned Lord Justice obviously assumed that the order drawn up was—as in fact it was—the order pronounced by the Judge. In my opinion, there was no jurisdiction in the learned Vice-Chancellor to do what he was asked to do in this case, and his decision is correct.

Solicitors: *T. H. & T. Dodd, Preston; William Bramwell, Preston; Finch & Johnson, Preston.*

H. C. J.

CORPORATION OF BRADFORD *v.* PICKLES.

C. A. 1894 *Oct.* 29, 30; *Dec.* 10.

[1892 B. 5672.]

Watercourse—Underground Springs—Interference with Flow of Water—Injunction—Mala fides—Purpose of extorting Money—Bradford Waterworks Act, 1854 (17 & 18 *Vict. c. cxxiv.*), *s.* 49.

The Plaintiffs were the owners of waterworks which they had purchased from a company which had constructed them under the powers of a special Act. The Act authorized the company to take the water from some springs called *Many Wells*, and sect. 49 provided that it should not be lawful for any person other than the company to divert in any other manner than by law they might be legally entitled any of the waters supplying or flowing from the springs called *Many Wells*, or to sink any well or pit or do any matter or thing whereby the waters of the said springs might be drawn off or diminished in quantity. The Act contained no provision for compensating landowners whose rights were affected by this section. The company accordingly appropriated the water of *Many Wells Springs*, and the Plaintiffs continued to do so.

The Defendant, who owned land adjoining the *Many Wells Springs* proposed to construct through his own land an underground tunnel, with the avowed purpose of draining some beds of stone lying under his land, the effect of which would be to diminish, if not to cut off entirely, the flow of water to and from the springs. The Plaintiffs alleged that the Defendant was not acting *bonâ fide*, but with the object of forcing the Plaintiffs to buy him off:—

Held, (1.) That, on the construction of sect. 49 of the Act, the Defendant

(1) 20 Q. B. D. 693.

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was not prohibited from doing anything that he was legally entitled to do independently of the Act; (2.) that, as the owner of the adjoining land, he was legally entitled to interrupt the water percolating underground through his land to the Plaintiffs' springs; and (3.) that, as the Defendant was legally entitled to make the tunnel, his motives and object in making it were immaterial. An injunction to restrain the Defendant from making the tunnel was therefore refused.

Judgment of *North*, J., reversed.

THIS was an appeal from a judgment of Mr. Justice *North* (1).

The Plaintiffs claimed an injunction to restrain the Defendant from making or continuing to use a drift or tunnel in his own land, and from permitting to remain or sinking further a certain shaft, or doing any act whereby the waters of the *Many Wells Springs*, in *Trooper* or *Many Wells Farm*, in the parish of *Bradford*, *Yorkshire*, and a stream called *Hewenden Beck*, flowing through the lands of the Plaintiffs and the Defendant, might be diminished or injuriously affected.

The facts, which are fully stated in the previous report, were shortly as follows:—

By the 5 & 6 Vict. c. vi., passed on the 22nd of April, 1842, the *Bradford Waterworks Company* were incorporated for the purpose of supplying the town of *Bradford* with water, and were authorized to purchase the works of a previously existing company, and to acquire lands for the purpose of their undertaking.

By sect. 233 the company were authorized to divert the course of *Hewenden Beck*, and also to take the water from the springs and streams called *Many Wells*, flowing in and through *Trooper* or *Many Wells Farm*.

Sect. 234 contained provisions identical with those of sect. 49 of the Act of 1854, hereinafter stated. Under these powers the company executed the works and purchased the lands referred to, and collected the water which flowed from *Many Wells Springs*, and from another spring at a short distance, in stone conduits and pipes for the purposes of their waterworks.

In 1854 the *Bradford Waterworks Act* (17 & 18 Vict. c. cxxiv.) was passed, for increasing the supply of water to the town of *Bradford*. With this Act the *Waterworks Clauses Act*, 1847, was incorporated. The company formed in 1842 was dissolved, and

(1) [1894] 3 Ch. 53.

a new company was incorporated under the same name, and the Act of 1842 was repealed. All the property and rights and privileges of the old company were vested in the new company, including, in express terms, the springs of water called *Many Wells* in *Trooper* or *Many Wells Farm*. The 49th section of this Act, upon which the questions in the action in great measure turn, was as follows :—

"It shall not be lawful for any person other than the company to divert, alter, or appropriate, in any other manner than by law they may be legally entitled, any of the waters supplying or flowing from certain streams and springs called '*Many Wells*' arising or flowing in and through a certain farm called *Trooper* or *Many Wells Farm*, in the township of *Willsden*, in the parish of *Bradford*, or to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs might be drawn off or diminished in quantity; and if any person shall illegally divert, alter, or appropriate the said waters or any part thereof, or sink any such well or pit, or shall do any such act, matter, or thing whereby the said waters may be drawn off or diminished in quantity, and shall not immediately on being required so to do by the company repair the injury done by him, so as to restore the said springs and the waters thereof to the state in which they were before such illegal act as aforesaid, he shall forfeit to the company any sum not exceeding £5 for every day during which the said supply of water shall be diverted or diminished by reason of any work done or act performed by or by the authority of such person, in addition to the damage which the company may sustain, by reason of their supply of water being diminished."

The Act contained no provision for compensating landowners whose rights were affected by this section.

By the *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), s. 14, which was also relied on in the argument, it was enacted that, after the supplies of water thereby or by the special Act authorized to be taken by the undertakers should have been so taken, any person who should illegally divert or take the waters supplying or flowing into the stream so taken, or who

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should do any unlawful act whereby the said stream or supplies of water might be drawn off or diminished in quantity, and who should not immediately repair the injury done by him on being required to do so by the undertakers, should forfeit the sums of money therein specified.

By the *Bradford Corporation Waterworks Act*, 1854 (17 & 18 Vict. c. cxxix.), the Corporation of *Bradford* were authorized to purchase the whole undertaking of the *Bradford Waterworks Company*, which they accordingly did, and the undertaking and all the rights and privileges of the company were thereupon vested in the corporation.

In 1889 or early in 1890 the Defendant, who owned land adjoining that of the corporation, sank a shaft in his land for the purpose, as he alleged, of draining the water from the stone lying beneath the surface of his land; and on the 5th of December, 1890, he served a notice on the Plaintiffs that he intended to work the mines and minerals lying under his land by sinking pits or shafts, and driving the drift or tunnel and constructing the drain in the direction and at the levels shewn on a plan attached thereto in accordance with the plans and the sections thereon, and, for the purpose of the working of his mines and minerals, to do such works as might be necessary, and to drain the same by means of engines or otherwise.

On the 27th of January, 1892, the Defendant entered into a contract for the construction of the works, which were commenced soon afterwards. The evidence proved that by the making of the tunnel and sinking of the shafts and other works the water supplying the *Many Wells Springs* and the Plaintiffs' reservoir would be seriously diminished and polluted, if not entirely cut off. The Plaintiffs alleged that the Defendant's object was not to work his stone quarries, but to extort money from the Plaintiffs.

The conformation of the ground and the position of the springs, and the nature and effect of the Defendant's works, are fully stated in the previous report.

At the trial of the action Mr. Justice *North* came to the conclusion that what the Defendant proposed to do was prohibited by sect. 49 of the Act of 1854, and granted an injunction to

restrain him from making any tunnel or doing any other act whereby the waters of the *Many Wells Springs* might be drawn off, diminished, or polluted.

The Defendant appealed from this judgment.

Everitt, Q.C., *Tindal Atkinson*, Q.C., and *Butcher*, for the Appellant:—

It was never intended by this private Act to give any rights or interests in property which were not to be bought and paid for; and it cannot be construed so as to take away a valuable right, by mere general words not in terms directed to that object, from a person whose notice had not been brought to the proposed provisions of the Act before it was passed: *London and North Western Railway Company* v. *Evans* (1). The question turns on the construction to be put on sect. 49 of the Act of 1854, which was substituted for another section practically identical in effect, viz., sect. 234 of the Act of 1842, and the first part of the section, which applies to "waters supplying or flowing from certain streams and springs," only prohibits acts done by persons "in any other manner than by law they may be legally entitled." And this must be taken to run through the whole section, for the penalty later on is only imposed on "illegal" acts. The alternative clause of the first part of the section merely prohibits acts "whereby the waters of the said springs might be drawn off or diminished in quantity." It is not suggested that we have diminished "the springs" themselves. We could not do so, as they arise on the Plaintiffs' own land; and "the waters of the springs" cannot mean waters which percolated underground before they got to the springs: *Grand Junction Canal Company* v. *Shugar* (2). Our construction of the section is the only one which makes it intelligible.

The question whether the object of the Defendant in making the shafts was with the *bonâ fide* intention of working his stone quarries is immaterial. Every man has a right to make what use he pleases of his own land and of the water that percolates through it; and if the situation of the land gives him a special advantage he has a right to the benefit of it: *Rawstron* v.

(1) [1893] 1 Ch. 16. (2) Law Rep. 6 Ch. 483.

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Taylor (1); *Chasemore* v. *Richards* (2). But there is in fact no evidence that the Defendant has been acting with *mala fides*.

Cozens-Hardy, Q.C., *Eyre*, and *C. M. Atkinson*, for the Plaintiffs:—

The Defendant has no right at common law to intercept the water coming to the Plaintiffs' conduits. The state of things in 1854 must be looked at, and at that time the water flowed from the springs in well-defined channels, and the Defendant had no right to interfere with the flow even though he did so by intercepting the water underground: *Gaunt* v. *Fynney* (3). But if he had a right at common law to intercept the water percolating through his land, he can only exercise that right *bonâ fide* for his own benefit, and cannot do so maliciously or in order to force the Plaintiffs to make terms with him. He can only exercise the right subject to the maxim "*Sic utere tuo ut alienum non lædas*": *Acton* v. *Blundell* (4); *Smith* v. *Kenrick* (5). The evidence shews that he is not acting with the intention of working his quarries, but to annoy the Plaintiffs and to oblige them to buy him off.

But whatever the Defendant's legal right may be, he is expressly forbidden to sink the shafts by sect. 49 of the Act of 1854. The words in that section, "in any other manner than by law they may be legally entitled," only apply to the first clause of the section, and do not qualify the distinct enactment in the second part which forbids any one to sink any such pit, or to do any act, matter, or thing whereby the waters of the springs might be drawn off or diminished in quantity. The section imposes additional penalties to those imposed by the *Waterworks Clauses Act*, 1847, s. 14. The fact that there is no provision for compensation is no objection to this construction. The Defendant had no property in the water percolating through his land, but only the right to use it while in his land; and the Legislature may well have considered that any interference with his rights in this respect might be disregarded in face of the

(1) 11 Ex. 369.
(2) 7 H. L. C. 349.
(3) Law Rep. 8 Ch. 8.
(4) 12 M. & W. 324.
(5) 7 C. B. 515, 564.

paramount necessity of providing a water supply for the people of *Bradford*: *New River Company* v. *Johnson* (1).

Everitt, in reply.

1894. Dec. 10. LORD HERSCHELL, L.C.:—

The rights of the parties which are in issue in this action depend mainly upon what is the true construction of sect. 49 of the *Bradford Waterworks Act*, 1854. The acts, or threatened acts, of the Defendant on which the Plaintiffs base their claim to relief were done by him upon his own land, and it is practically admitted that, apart from one point made by the counsel for the Plaintiffs, these were acts in respect of which they would have no legal right to redress, unless such a right be conferred on them by the enactment to which I have alluded. The point I refer to is that, inasmuch as the Defendant's intention was (it was alleged) not to benefit himself, but maliciously to injure the Plaintiffs, they had at common law a right to relief. I will deal with this point at a later stage, and will assume for the present that the Defendant is not infringing any rights of the Plaintiffs at common law. The argument on their behalf then necessarily involves the proposition that the Defendant's rights in relation to his property have been curtailed by the enactment on which they rely. This being so, it becomes essential to consider the nature of that legislation. By an Act of 1854 the then existing *Bradford Waterworks Company* was dissolved, and a new company incorporated under the same title, having the same objects, but designed to serve a more extended area. By this Act the rights and powers of the old company were vested in the new one, and the provisions which had been inserted in the earlier Act for their benefit and protection were re-enacted. Sect. 49 of the Act of 1854 was a repetition, with merely verbal alterations, of the provisions of sect. 234 of the *Bradford Waterworks Act*, 1842. That Act incorporated a company to be called the *Bradford Waterworks Company*. It was a trading company, formed for the purpose of making profit, although the profits were by its Act limited, practically speaking,

(1) 2 E. & E. 435.

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to 10 per cent. interest on the capital invested. The first half of the Act contains provisions regulating the rights of the company and its members; then follow clauses relating to the compulsory purchase of land and the mode of assessing compensation. Sect. 232 empowers the company to enter upon any lands or waters mentioned in the book of reference, making satisfaction to all persons interested in any land or water used for the purposes of the Act. Sect. 233 makes it lawful for the company to divert and take "the springs and streams of water called '*Many Wells*' arising or flowing in and through a certain farm, lands, and grounds called *Trooper* or *Many Wells Farm*." Then follows the section which has to be construed. Having regard to the nature of the Act and its provisions generally, I think there is a strong presumption that the section in question was not intended to interfere with the rights of any person without compensation. The language of the Act is presumably that of those who promoted it, and there would be nothing to bring its provisions to the notice of any person whose lands or rights were not mentioned in the plan and book of reference. It was urged that the Act recites that a supply of pure water would be of advantage to the town of *Bradford*. This, no doubt, was a justification for conferring the power of taking the property of private persons by compulsion, even though it were on the terms of making compensation. But the undertaking was constituted with the view of making profit, and it would not be in accordance with the ordinary course of legislation to take away without compensation the private rights of individuals for the benefit of the undertakers, or even for the benefit of the inhabitants of *Bradford*. It was indeed urged that, in view of the situation and character of the Defendant's land, it would not interfere with any rights which he could profitably use if he were restrained from any act on his land which could diminish the quantity of water issuing from the *Many Wells Springs*, and that for this reason the Legislature might have been willing to permit a limitation of his legal rights without compensation. I think it would be somewhat extravagant to suppose that any such matter was in the contemplation of the Legislature. There would be nothing to bring before them the facts necessary for forming an opinion

on the point, and it is clear that, if the argument of the Plaintiffs be well founded, any operation on the Defendant's land, or the land of any other proprietor, which sensibly diminished the water flowing from the springs, would be prohibited, whatever the nature of the operation, and at whatever distance from the Plaintiffs' boundary. I am certainly not prepared to say that the Plaintiffs' contention, if sustained, could not possibly affect the rights of the Defendant or other persons; and the evidence in the present case, with its conflict on both matters of fact and intention, shews at what peril of litigation, dependent largely on expert evidence, the adjoining proprietors would undertake operations which landowners generally may carry out, subject to no control but their own judgment of what would be expedient or advantageous. No doubt, if the language of the enactment reasonably admits only of a construction which would involve the consequence that individuals were deprived of their rights without compensation, effect must be given to it notwithstanding the presumption that there may be against the Legislature so enacting; but if, on the other hand, it is capable of a construction which would avoid such a consequence, I have no hesitation in saying that this is the construction to be adopted.

All these observations apply equally to sect. 49 of the later Act, which is now in force. Notwithstanding some suggestions to the contrary, I think it clear that the construction of the two sections must be the same. Before examining the terms of the critical section, I will state very briefly the circumstances which have given rise to the litigation. The *Many Wells Springs* issue from the hill-side a short distance within the Plaintiffs' boundary, the Defendant being the owner of adjoining land higher up the hill. He was proceeding to sink certain shafts upon his land and to make a drift, with the alleged object of unwatering his property, with the view of working the stone which was said to exist at some distance beneath the surface of his land. The Plaintiffs alleged that the water which percolated through the surface of the Defendant's land was confined within it by faults which ran through his land, at some distance from one another, in a more or less parallel direction, and which thus made the Defendant's land a natural reservoir, where the waters were

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collected which emerged from the hillside upon the Plaintiffs' land at *Many Wells Springs*. The Plaintiffs maintained that the effect of the Defendant's operations would be to collect and divert the water before it found its way to the Plaintiffs' land, and thus to diminish seriously the volume of water issuing at the springs; they therefore sought an injunction to restrain the Defendant from proceeding with his intended works.

I pass now to an examination of the terms of the section in question. I may say at the outset that it is very ill-drawn, and that it is not possible, in my opinion, to put on it any construction which is altogether satisfactory. The main object of the section, as it seems to me, was to impose a special penalty on the illegal diversion of the company's waters, in addition to any relief which the common law would afford for such a wrongful act. That this was the primary object is, I think, indicated by the earlier words of the section, which render it unlawful for any person other than the company to divert, alter, or appropriate, in any other manner than by law they may be legally entitled, any of the waters supplying or flowing from the *Many Wells* streams and springs. It is obvious that this provision creates no new duty, inasmuch as it reserves any legal title to interfere with the water supplying or flowing from the springs. In my opinion, its insertion was merely introductory to the later part of the section, which imposed a special penalty for illegal interference with them. This is, I think, an explanation which removes the difficulty felt by Mr. Justice *North*, who said that it made nonsense of the section to suppose that it enacted that a man was not to do certain specified things, except so far as he might lawfully do them. He found a way out of the difficulty which he felt by concluding that the opening provision was intended to preserve as against the waterworks company such rights over the waters in question as an upper riparian proprietor has against a lower riparian proprietor in an open stream. For the reasons I have given, I do not feel the difficulty by which the learned Judge was pressed, and I cannot find in the language of the section any justification for limiting the operation of the words to the case to which he thought it applied. It seems to me to cover every act which a person was legally entitled to do, the

effect of which would be to divert, alter, or appropriate any of the waters supplying the stream. The language is, in my opinion, just as applicable to percolating water as to water flowing in a defined channel aboveground. The Plaintiffs were not able to rely on this part of the section, inasmuch as they were at once confronted with the difficulty that the Defendant alleged that he was legally entitled to deal in any way he pleased on his land with the water percolating therein. They rested their case upon the enactment of the section which follows the one I have quoted, and which provides that it shall not be lawful "to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs might be drawn off or diminished in quantity." And they pointed out that in this part of the section the right to do all acts which persons were legally entitled to do was not reserved. Upon this two questions arise: (1.) Is the reservation of existing legal rights to be regarded as applying to these acts as well as to those to which the earlier part of the section refers? And (2.) does the appropriation or diversion of percolating water, before it reaches the springs, come within the prohibition? It must be admitted that there is great difficulty, as a matter of grammatical construction, in reading the reservation into that part of the section now under consideration, strange as it might seem that the Legislature should have preserved existing rights in the one case and not in the other. But, if effect were given to the contention of the Plaintiffs that the waters supplying the springs were included in the words "waters of the said springs," so that the diversion or appropriation of percolating water before it reached the springs would be within the latter part of the enactment, this absurdity is involved—that the reservation of existing legal rights in the earlier part of the section is rendered absolutely nugatory, for diverting or appropriating the percolating water would necessarily be doing an act or thing whereby the waters of the springs might be diminished. It is to be observed that, whereas in the earlier part of the section the words used are "the waters supplying or flowing from the springs," in the later part the words used are "the waters of the said springs." Now, it would certainly be in accordance with sound canons of construction to attribute to the later words

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a different meaning from that borne by the former, inasmuch as it would be difficult to suggest a reason for the change, unless some changed meaning were intended. The springs are described as "arising or flowing in and through *Many Wells Farm*." It is certainly not unnatural to say that water which is percolating in the adjoining land, and which never reaches the spring thus described as "arising" in the farm, is not "water of the spring," and it seems to me to be a possible construction of the provision under discussion to confine it to water which has formed a part of the spring. Mere interference with water percolating on adjoining lands which prevented that percolating water from forming part of the spring might in that case not improperly be said to be outside the enactment. It may, indeed, be asked why, even on this construction, the Legislature should be supposed to have reserved existing legal rights in the earlier and not in the later part of the section? The answer may be that, at the time when the Act of 1842 was passed, the case of *Acton* v. *Blundell* (1) had not been decided, and it may have been thought that, whilst a legal right existed to intercept percolating water before it reached a spring, there was no right by abstracting percolating water to drain off or diminish the quantity of water flowing in a defined channel. And there would certainly be in general no right to divert, alter, or appropriate waters "flowing from" the *Many Wells Springs* so as to diminish its quantity.

I freely admit that the construction which I have indicated is not absolutely satisfactory and does not solve all the difficulties. But, in view of the considerations to which I have called attention, it is perhaps the best solution that can be arrived at, and the one most in accordance with the principles which ought to guide in the construction of an Act such as that with which we have to deal. But, if it be not admissible, the only alternative, as it seems to me, is to read the words which reserve existing rights as applicable to both limbs of the section. To prevent the absurdity and inconsistency which would otherwise result, one or other of these alternatives must, I think, be adopted, and for the purposes of this case it matters not which.

(1) 12 M. & W. 324.

I notice one argument of the learned counsel for the Plaintiffs to shew that I have not overlooked it. They urged that, inasmuch as, when the Act of 1854 passed, the water was carried from the springs in pipes to *Bradford*, the sinking of a well or pit could not draw off or diminish the "water of the springs," unless these words included the water percolating in the Defendant's lands adjoining the springs, and that therefore the construction of these words which I have suggested was inadmissible. I have already said that I think it would not be right under the circumstances to attribute to sect. 49 of the Act of 1854 any different meaning from that to be put upon the corresponding section of the Act of 1842. But, besides this, when it is remembered that the clause was inserted at the instance of the promoters of a local and personal Act for their protection, and that they would naturally employ the broadest and most general words, so as to be sure that no case intended to be covered was omitted, I think it would be wrong to admit, as an argument for putting a construction upon the enactment which would prejudice the rights of third parties, that some of the words employed could not in fact otherwise be operative.

There remains the point to which I adverted, viz., the argument that, even if the Defendant is not otherwise infringing any rights of the Plaintiffs, he may be restrained from a malicious exercise of his legal rights, his design being to injure the Plaintiffs, and not to benefit himself. There is the high authority of Lord *Wensleydale* for stating that this principle has not found a place in our law. No case has been cited where relief has been given by the Courts on any such ground. It could hardly be asserted that this was because no person had ever thus exercised his legal rights to the prejudice of his neighbour. But it is enough to say on the present occasion that, even if the proposition contended for were established, I do not think the Plaintiffs have shewn that the present case falls within it. It is suggested that the Defendant's object is, by the exercise of his rights, so to affect the supply which the Plaintiffs receive of the water percolating through his land as to compel them to purchase the land, or some right which will secure the uninterrupted flow of the water to the springs. If this be his object (which I will

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assume for the purpose of my judgment), I do not think it can be regarded as malicious. He would say, "The water which at any time is percolating in my land is, so long as it remains in my land, as much mine as any part of the soil, and, if the conformation of my land be such that it acts as a natural reservoir, there is no reason why I should not take advantage of that, so as to secure a benefit to myself, if my neighbours are desirous of reaping the advantage of this natural reservoir in the land which adjoins their own."

I think, therefore, that the judgment of Mr. Justice *North* should be reversed and the action be dismissed with costs, and that the Appellant should have the costs of the appeal.

LINDLEY, L.J.:—

The Plaintiffs in this case are (*inter alia*) a waterworks company, and they want water. The Defendant is the owner of some land which is full of water which he does not want. This water supplies some wells which belong to the Plaintiffs, and, if cut off by the Defendant, will materially diminish the water which the Plaintiffs will be able to pump. The Defendant says to the Plaintiffs, "If you want me to supply you with water you must pay me for it, and if you will not pay me what I want, you shall not have water from my land, and I will cut it off." The Defendant and the Plaintiffs being unable to come to terms, the Defendant has begun to construct works which, if completed, will cut off, or at all events greatly diminish, the Plaintiffs' supply. The Plaintiffs thereupon bring this action and apply for an injunction, which Mr. Justice *North* has granted. The Defendant has appealed; and this Court has now to decide whether the injunction can be maintained or not.

I entirely concur in the view taken by Mr. Justice *North* of the conduct of the Defendant. He does not want the water himself, nor does he want to get rid of it in order the better to work his own land. He simply wants to force the Plaintiffs to buy his land, or the water coming from it, at his own price, regardless of the interests of other people who will be seriously inconvenienced if the Defendant cuts off the supply. But Mr. Justice *North* held, and in my opinion rightly held, that these

circumstances are not enough to justify the Court in interfering with the Defendant. The only question a Court of Law or Equity can consider is whether the Defendant has a right to do what he threatens and intends to do. If he has he cannot be interfered with, however selfish, vexatious, or even malicious his conduct may be: see *Chasemore* v. *Richards* (1). This is not one of those cases in which an improper object or motive makes an otherwise lawful act actionable. It is not like libel or malicious prosecution, or what are called frauds on powers.

Apart from special legislation, the right of the Defendant to drain his own land by getting rid of all the water which percolates into and through it underground cannot be denied: see *Chasemore* v. *Richards* and *Acton* v. *Blundell* (2); and this is all that he is doing. He is not diverting any defined stream. If, as the Plaintiffs say, he is not entitled to do what he intends to do, it must be by reason of some special legislation, and not by reason of the ordinary law of the country. The Plaintiffs rely on certain Acts of Parliament which confer upon them special rights in order to enable them to supply the town of *Bradford* with water, and the Plaintiffs contend that these Acts restrict the ordinary rights of the Defendant to drain his own property. It is necessary, therefore, to examine these Acts and see whether they do or do not go as far as the Plaintiffs contend. I have come to the conclusion that they do not. The statute now in force, and on which the case really turns, is the *Bradford Waterworks Act*, 1854 (17 & 18 Vict. c. cxxiv.), which repealed and replaced an earlier special Act of 1842 (5 & 6 Vict. c. vi.). This Act incorporated the *Bradford Waterworks Company* in order to supply *Bradford* with water.

I have looked in vain through these Acts for any provision for compensating the Defendant or his predecessors in title for any interference with their rights where their land is not taken and is not injuriously affected by the execution of the works which the Plaintiffs or their predecessors were authorized to construct. The only compensation clauses which I can find are sect. 170 of the Act of 1842, and sect. 68 of the *Lands*

(1) 7 H. L. C. 349. (2) 12 M. & W. 324, 354.

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Clauses Consolidation Act, 1845, and sect. 12 of the *Waterworks Clauses Act*, 1847, both of which are incorporated into the Plaintiffs' Act of 1854 (see sect. 3). There are clauses in the Act of 1842 for compensating certain persons therein named (*e.g.*, Mrs. *Ferrand*: see sect. 275, *et seq.*); but I can find no clause either in the Act of 1842, or in the Act of 1854, or in the Acts incorporated with it, for compensating the Defendant for any restriction on his common law rights, or for paying him for water drawn from his land into the Plaintiffs' wells by the Plaintiffs' pumping operations. The absence of all provisions for such compensation is very material when we have to construe an obscure clause which is said to curtail the Defendant's ordinary rights.

The particular section on which the Plaintiffs rely is sect. 49 of the Act of 1854, which is in effect a re-enactment of sect. 234 of the Act of 1842. The sect. 49 is ill-drawn, but it is a penal section inflicting a heavy penalty of not more than £5 a day on any person who unlawfully interferes with the supply of water to which the company is entitled. But in my opinion it does not restrict the common law rights of persons owning land next to or in the neighbourhood of the Plaintiffs' own lands and wells. There are undoubtedly words in the section which might be construed so as to prohibit neighbouring landowners from exercising their common law rights of sinking wells or pits on their own land; but the early part of the section plainly shews that it was not intended to restrict their rights to divert, alter, or appropriate the waters supplying or flowing from the streams and wells, and the language is too obscure to prevent them from doing so by sinking wells or pits, provided only they do no more than by common law they are entitled to do. In the clause commencing, "If any person shall illegally divert, &c., or sink, &c., or shall do any such act, &c.," the word "illegally" is in my opinion used in the same sense throughout, *i.e.*, illegally having regard to what can be lawfully done irrespectively of that particular section. This is the plain meaning of the word so far as it refers to diverting, altering, or appropriating water, and I see no sufficient ground for holding that the word has a different meaning when referred to sinking wells or pits, or

doing other acts, &c., whereby the waters referred to are drawn off or diminished in quantity. The section is badly worded; but in the absence of all provision for compensation I cannot hold that the section itself prohibits a neighbouring landowner from sinking a pit or well on his own land, although the effect may be to deprive the Plaintiffs of a supply of water which they would otherwise have.

It was contended that, as the *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), is incorporated with the Act of 1854, and the *Waterworks Clauses Act*, 1847, by sect. 14 imposes penalties on wrongdoers, the insertion of sect. 49 of the Act of 1854 shews that something more was meant than to inflict penalties for doing what was wrong at common law. I do not, however, feel convinced by this argument. Sect. 49 of the Act of 1854 is a mere repetition of sect. 234 of the Act of 1842, which was prior in point of date to the *Waterworks Clauses Act*. The preservation of this section is probably due to a desire on the part of the corporation to keep the old section in their special Act so as not to lose any protection it might give beyond that afforded by sect. 14 of the *Waterworks Clauses Act*, which was made applicable to all companies whose special Acts might incorporate its provisions. The fact that sect. 234 of the Act of 1842 is retained in the Act of 1854 is not, however, in my opinion, sufficient to justify the inference that Parliament intended to alter the effect of the old section and to give to the *Bradford* Corporation greater rights as against neighbouring landowners than the old waterworks company had under their Act, in which the section first appeared.

For these reasons, I am reluctantly driven to the conclusion that the Defendant is not exceeding his legal rights, and that the appeal must be allowed, and the action against him must be dismissed with costs in the usual way.

A. L. SMITH, L.J.:—

The decision in this case depends principally upon the true construction of sect. 49 of the Act of 1854 (17 & 18 Vict. c. cxxiv.), which Act repealed and by sect. 49 in substance re-enacted sect. 234 of an Act of 1842 (5 & 6 Vict. c. vi.), which

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was an Act for the better supplying with water the town and neighbourhood of *Bradford*.

Mr. Justice *North* arrived at the conclusion that the works which the Defendant was executing, and against which the injunction has been obtained by the Plaintiffs, were deliberately planned by him for the purpose of intercepting the water which had previously issued from the *Many Wells Springs* belonging to the Plaintiffs, and that the desired result would be thereby accomplished, and that what the Defendant was doing was not in order that he might be enabled to work his stone, as he put forward in evidence, but in order that the Plaintiffs might be driven to buy him out at the price he himself might value his interest at. These findings are well warranted by the evidence. It appears that the Defendant, to bring this about, is intercepting the subterranean water percolating under his own land before its arrival by natural gravitation at the land of the Plaintiffs, where the *Many Wells Springs* are situated; but, in considering the true construction of the section, the motive of the Defendant is immaterial, and it must be interpreted as if the Defendant was sinking a well upon his own land for his own legitimate purposes.

No question of tapping or diverting a defined stream arises upon the facts proved in the present case, and it cannot be now disputed that at common law, apart from the point as to the Defendant's motive, which I will deal with hereafter, he is within his rights in doing what he is doing, unless sect. 49 forbids it. The law upon this subject was definitively settled in the year 1859 in the House of Lords in the case of *Chasemore* v. *Richards* (1), where the question arose as to the right of an owner of land to sink a well upon his own premises, and thereby abstract the subterranean water percolating and oozing through his soil which otherwise, by the natural force of gravity, would have found its way into springs which fed the River *Wandle*, the flow of which the plaintiff in the action had enjoyed for upwards of sixty years. It was held, first, that the landowner was entitled upon his own land to sink a well, and thereby tap and appropriate the underground percolating water, even though the result was

(1) 7 H. L. C. 349.

to diminish the water of the *Wandle*, which had been so long enjoyed by the plaintiff; and, secondly, that he could do so, even although he did it, not for his own use, but to enable him to supply a whole town with water. Lord *Wensleydale*, though agreeing that the landowner had a right to sink a well and appropriate the percolating underground water, doubted the legality of his abstracting it for the use of a large district in the neighbourhood unconnected with his own estate, applying the maxim, "*Sic utere tuo ut alienum non lædas*," and thought that the landowner could only exercise his right in a reasonable manner; but this view found no favour either with the Judges who were called in to advise the House or with the noble Lords who delivered judgment upon the case. No reasons were given why the maxim was inapplicable; and it appears to me that it may have been so held, upon the ground that an adjacent landowner has no property in or right to subterranean percolating water until it arrives underneath his soil, and that therefore no property or right of his is injured by the abstraction of the percolating water before it arrives under his land. It is not the case of a natural stream flowing either above or below the surface in a definite channel, to which an adjacent owner has a right *ex jure naturæ*.

The Act of 1842, in its preamble, recites that the inhabitants of the town of *Bradford* and its neighbourhood were then very inadequately supplied with water, and that a sufficient and constant supply of pure and wholesome water would be of great advantage to the inhabitants, and that it was ascertained that such a supply could be obtained, and that several persons were willing, at their own expense, to make and maintain the necessary works for affording such supply; and by sect. 1 it is enacted that a company should be established for that purpose, and by subsequent sections powers were given to the persons incorporated to purchase lands, and also the *Many Wells Springs*.

It was stated in evidence by one of the witnesses that the *Many Wells Springs*, at the time when the company purchased them and set up its works, constituted the entire supply of water for the town of *Bradford*. Now, sect. 49 of the Act of 1854 is unquestionably, amongst other things, a penal section; for powers

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are thereby given to the proposed company to recover penalties not exceeding £5 per diem against any person contravening the enactments of that section, in addition to any damages the company might sustain by reason of their supply of water being thereby diminished; and the real point in this case is whether, when a person is doing what at common law he is entitled to do upon his own land, he is or is not acting in contravention of the section; for I apprehend, although a penalty is given, that would not of itself be an answer to an application for an injunction to restrain him from acting contrary to the section. There are no provisions in the Act for compensating a person in the position of the Defendant if he is, as Plaintiffs now argue, to be deprived of the right of dealing with and using the percolating water as he desires, and which, apart from the section, the law allows him to do.

Before I come to the section there appear to me to be two considerations worthy of notice. On the one hand, the object of the Legislature was to procure pure water for *Bradford*; and on the other, that the Act has not provided any compensation for the rights it is said to have taken away from the Defendant. Bearing this in mind, what does this section enact? In the first place, the section does not forbid a person diverting, altering, or appropriating any of the waters supplying or flowing from the *Many Wells Springs* in any manner as by law he was then entitled to do; but, on the contrary, this is expressly permitted by the section. This, as far as it goes, is in derogation of the supply of pure water to *Bradford*. If the section had stopped here there would have been no difficulty, and there was no need of providing compensation to any one; for what a person was entitled by law to do as to diverting, altering, or appropriating water supplying or flowing from the *Many Wells Springs* before the Act passed he was entitled to do after. But the section goes further, and enacts that it shall not be lawful for any person (other than the company) "to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs might be drained off or diminished in quantity." It is said that the reservation in favour of the right to water of individuals existing by law when the Act was passed, though reserved to persons

mentioned in the first limb of this section, is not reserved in the second limb, and that the second limb contains an absolute prohibition from doing any act, matter, or thing whereby the waters of the springs might be drawn off or diminished in quantity. I agree that upon first reading this badly drafted section it would appear to be so; but upon consideration I cannot so read it. I cannot see that the language of the section is such as to compel me to hold—enacting as it undoubtedly does that a person is entitled after the Act was passed to divert, alter, or appropriate any of the waters supplying or flowing from the *Many Wells Springs* as the law then entitled him to do, no matter to what extent, without being liable to a penalty—that the same section also enacts that he is not entitled after the Act was passed to do any act, matter, or thing such as sinking any well or pit whereby the waters of the springs might be drawn off or diminished in quantity, and if he does so is to be liable to a penalty. This reading of the two limbs of the section appears to me to be meaningless, viz., that a person after the passing of the Act might divert the waters supplying the springs to any extent if he was then entitled by law to do so, and yet at the same time he was absolutely forbidden from doing any act whereby the waters of the springs might be diminished in quantity. In my opinion, the true meaning of the section is not this, but is as follows:—The parenthesis "in any other manner than by law they may be legally entitled" is to be read after the words "other than the company," and before the words "to divert." This will make the sentence intelligible, and will prohibit a person doing what the law then did not permit him to do, whereby the company's supply of water is diminished, and render him liable to a penalty if he does so, and will also allow him to do what the law then permitted without being liable to a penalty; and this will account for the fact of there being no provision as to compensation in the Act to meet a case like that of the Defendant, for upon this reading none is required.

Mr. Justice *North* considered that this made nonsense of the section, for he says it makes the section enact that a man is not to do certain specified things except so far as he may lawfully do them; but the learned judge omitted, I think, to notice what

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I take to be the paramount object of the section, viz., the imposition of a penalty in favour of the company; and why is it nonsense to enact that if a man does certain specified things which the law does not permit he shall be liable to a penalty? And what is more, the first limb of the section undoubtedly does enact that he may not do certain specified things except so far as by law he may be legally entitled. For these reasons I think that what the Defendant has been doing and is proposing to do is not in breach of the section.

It was next said on behalf of the corporation that, suppose this to be so, yet, at common law, the Defendant was not entitled to tap and appropriate water percolating under his land if he did so with the malicious intent of injuring his neighbour, and that the finding of Mr. Justice *North* amounted to such a malicious intent. I do not think that they do; for an intent by one to coerce another to purchase his land even at his own price cannot, as it seems to me, be held to be a malicious intent to injure that other—it is in reality an intent to benefit himself. But even if this were otherwise, such a doctrine has no place in the common law of *England*. The observations of Mr. Justice *Maule* in *Acton* v. *Blundell* (1), repeated in the judgment of the Court (2), were cited in support of the proposition; but it appears to me that at any rate, as far as this Court is concerned, the passage in Lord *Wensleydale's* judgment in *Chasemore* v. *Richards* (3) is decisive. He says: "The civil law deems an act, otherwise lawful in itself, illegal if done with a malicious intent of injuring a neighbour, *animo vicino nocendi*. The same principle is adopted in the law of *Scotland*, where an otherwise lawful act is forbidden 'if done in *æmulationem vicini*'; but this principle has not found a place in our law." In my judgment, by the common law of *England* a man may deal with his own in any way he pleases irrespective of what his motive may be so long as he transgresses no statute, no contract, or the maxim above referred to.

For these reasons it appears to me that what the Defendant is doing is not contrary to either the statute or the common law of

(1) 12 M. & W. 336. (2) 12 M. & W. 353.
(3) 7 H. L. C. 349, 388.

England, and, consequently, the Plaintiffs are not entitled to an injunction, and that this appeal must be allowed and the action dismissed with costs here and below.

Solicitors: *Cann & Son*, agents for *W. T. McGowen, Bradford; Ullithorne, Currey, & Villiers*, agents for *W. & G. Burr & Co., Keighley.*

M. W.

CHITTY, J.
1894
Nov. 9.

CLEVELAND WATER COMPANY *v.* REDCAR LOCAL BOARD.

[1894 C. 3116.]

Local Government—Water Supply—Waterworks Company—Local Authority—Restriction on Construction of "Waterworks"—Notice—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 51, 52, 55.

Sect. 51 of the *Public Health Act*, 1875, authorizing a local authority to supply its district with water, must be read in connection with sect. 52, with the result, that the prohibition contained in the latter section is not absolute but one of degree, which is not intended to apply to a case where the local authority already has substantial waterworks, so as to prevent it from adding to or improving them.

The provision in sect. 52, requiring notice to be given by the local authority before commencing to "construct waterworks" within the limits of supply of any water company, applies only to "new waterworks," and does not apply to additions or improvements in existing waterworks.

MOTION.

The question raised by this application turned on the construction of sect. 52 of the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), which lays down the conditions and restrictions under which a local authority may supply their own district with water, when there is in the same district a waterworks company "able and willing" to supply water, proper and sufficient for all reasonable purposes. There was no dispute as to the facts, which were shortly as follows:—

In the year 1856 the predecessors of the Defendant board had constructed waterworks for supplying *Redcar* with water under the provisions of the *Public Health Act*, 1848 (11 & 12 Vict. c. 63), s. 75, which were substantially the same as those contained in the *Public Health Act*, 1875, ss. 51, 52, and for this purpose had obtained leases of the necessary land and water supply from Lord *Zetland*, a neighbouring landowner, and had borrowed money under their statutory powers for the purposes of these works.

In the year 1883 the Defendant board enlarged their works by constructing a reservoir capable of containing 450,000 gallons, and by laying down further pipes for the supply of water to

their district. They made further additions again in the year 1886.

In 1869 the Plaintiff company was incorporated under a special Act, by which they obtained powers for supplying water to a large area, which included *Redcar*; but they had not up to the present time supplied *Redcar* with water, though they were now in a position to do so, as their pipes passed through *Redcar* on their way to supply a neighbouring town.

The Defendant board now proposed to construct an additional reservoir, to be connected with the existing system, capable of containing 6,000,000 gallons, for which purpose they were going to acquire additional land from Lord *Zetland* and a fresh source of water supply. The population of *Redcar* was stated to have increased from about 1200 in 1856 to 2800 at the present time, and the rateable value from £3500 to £13,000. The proposed addition was considered desirable, partly in consequence of the drought that occurred during the year 1893, partly for the storage of the water, and partly to meet the increased requirements of the place.

The Plaintiff company commenced the present action, and now moved for an interim injunction, to restrain the Defendant board from commencing or proceeding to construct waterworks in the district of *Redcar*, or elsewhere within the limits of supply of the Plaintiff company, unless and until they should first have given written notice to the Plaintiff company, stating the purposes for, and the extent to, which water was required by them as the local authority, pursuant to sect. 52 of the *Public Health Act*, 1875, the Plaintiff company being able and willing to supply water in that district sufficient for all reasonable purposes, and unless and until the settlement by arbitration under that Act of any differences between the parties as to the supply of water within the said district.

Whitehorne, Q.C., and *Micklem*, for the motion :—

By our special Act the Plaintiff company is to have the practical monopoly of supplying with water, the area comprised in the Act; the policy of sect. 52 of the *Public Health Act*, 1875, was to protect this monopoly: *Richmond Waterworks Company*

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v. *Vestry of Richmond (Surrey)* (1). It is not denied that we are "able and willing to supply" sufficient water for all reasonable purposes.

The term "waterworks" is defined by sect. 4 as including "springs" and "reservoirs," and "lands and buildings" for the supply of water; the Defendants are proposing to acquire a fresh spring for their supply and more land, and are going to make an entirely new reservoir; they are, therefore, "commencing to construct waterworks" within our limits of supply, and they must not do this without giving us notice, and otherwise complying with the provisions of this section. Further, as we are "able and willing to supply water" sufficient for all reasonable purposes, the Defendant board are forbidden, by the express terms of the section, from carrying out their proposals. To make a new reservoir is to "construct" new "waterworks"; that it is an addition to an existing system makes no difference. These words must not be confined to "before commencing to construct for the first time," but before commencing to construct the particular waterworks which, though an addition, will be new waterworks. This is not a slight enlargement of existing works or repairs, which might be permissible; the proposed works are in excess of the existing works. That the Plaintiff company has a right to apply for an injunction by virtue of sect. 52 is plain from *Newhaven and Seaford Water Company* v. *Newhaven Local Board* (2).

Byrne, Q.C., and *A. T. Lawrence*, for the Defendant board:—

A reasonable interpretation must be put upon these restrictions, otherwise a local board could not even repair its existing works. "Waterworks" in sect. 52 must be read in connection with the context; the works proposed are only an addition to, or an extension of, existing waterworks. We are not setting up a rival undertaking as was mentioned in *West Surrey Water Company* v. *Guardians of Chertsey Union* (3). By sect. 55 we are bound to keep up a supply of pure water, and to do this we are advised we must enlarge our existing works; the Legislature

(1) 3 Ch. D. 82. (2) *The Times*, January 21st, 1882.
(3) Since reported [1894] 3 Ch. 513.

cannot have been so unreasonable as the Plaintiffs try to make out. The Act of 1875, sects. 51 and 52, was primarily an enabling Act, authorizing local authorities to supply water; and the proviso at the end was only to protect vested interests, and to prevent a local authority starting waterworks, within the limits of supply of a waterworks company, in competition with that company. Everything that has been done since 1856 has been done under statutory authority, and it is unreasonable to suppose that we may not repair, maintain, or enlarge our existing system in accordance with modern ideas and necessities.

Whitehorne, in reply.

CHITTY, J. (after stating the facts, and observing that all the acts of the Defendant board appeared to him to have been within the authority of the *Public Health Acts*, 1848 and 1875, continued):—

The Plaintiff company say that the Defendant board are not justified in their proposal to construct these new waterworks, until they have given the notice required by the 52nd section and otherwise complied with its terms. The 52nd section must be read in connection with the 51st; and I think I am justified in saying that the object of the 52nd section was at least to afford protection to a waterworks company, such as the Plaintiffs are. It may be also that Vice-Chancellor *Hall* was right in saying, as he did in *Newhaven and Seaford Water Company* v. *Newhaven Local Board* (1), that the section was for the benefit of the ratepayers; but in the same case he held—and I have not the slightest hesitation in following his authority on this point—that a waterworks company, such as the Plaintiffs are, are entitled to sue on the 52nd section.

In the opening of the case the popular expression "monopoly" was used with reference to the Plaintiff company, and it was said that they had the statutory monopoly of supplying water in this district. The term "monopoly" may pass in ordinary language. The true view of the matter however is this: Parliament has constituted the Plaintiff company for the purpose

(1) *The Times*, January 21st, 1882.

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of enabling them to supply with water the large district which is covered by their Act of Parliament. There is no monopoly in terms conferred upon the Plaintiff company—that is to say, there is no section denying the right of any other person or company to supply water within the same district. But the term "practical monopoly" very fairly represents the position of the Plaintiffs, because no person or company can practically carry on the business of supplying water on a large scale to any district without the authority of Parliament. It will suffice to mention one point alone on this head, namely, the breaking up of the streets for the purpose of laying down pipes. In another sense, too, a water company may be said practically to have a monopoly, because, according to the usual practice of Parliament, when there is an existing company performing its statutory obligations and competent to deliver within the limit of supply sufficient water, it is not the practice of Parliament to incorporate another company to supply water within the same district.

Now, I have explained my view of this term "monopoly" because it was made use of as a ground of claim on the part of the Plaintiffs. It is plain in this case, that the Plaintiffs had not a monopoly for the supply of water in *Redcar*, because it is plain that the Defendant local board also had a right of supply. The Plaintiff company are asking for an injunction to restrain the Defendant board from proceeding with their proposed works. If the works are executed, and if there is no injunction granted, the Plaintiff company will still be at liberty to supply water in *Redcar* to all the persons willing to take water from them. I make this observation because I was asked the question during the argument, what was the use of the Plaintiff company's Act of 1869 unless they had this monopoly to protect them? I answer by saying the Act stands, and the Plaintiff company will be justified in supplying the water to any person who will be willing to take it. There is no question between the parties on the motion that the Plaintiff company is at the present time ready and willing to supply water according to the 52nd section.

Now I come to deal a little more closely with the question of construction. I have said that the two sections ought to be

read together. The 51st section authorizes the local authority to provide their district "with a supply of water proper and sufficient for public and private purposes." There are similar words in the 75th section of the Act of 1848, and, consequently, it follows that the Defendant board, having all the rights of their predecessors, have exercised the power that is here conferred upon the local authority, and they are now in a position to say, as they do say, that they have Parliamentary authority for the supply of water proper and sufficient for the public and private purposes of *Redcar*. The rest of the section is not very material for the present case.

Then comes this 52nd section, on the introductory words of which the argument has mainly turned: "Before commencing to construct waterworks within the limits of supply of any water company empowered by Act of Parliament"—I will omit the intermediate words—"the local authority shall give written notice to every water company within whose limits of supply the local authority are desirous of supplying water"—important words in my opinion—"stating the purpose for which and (as far as may be practicable) the extent to which water is required by the local authority." Then, in supplement of that, comes the enactment, "It shall not be lawful for the local authority to construct any waterworks within such limits if and so long as any such company are able and willing to supply water proper and sufficient for all reasonable purposes for which it is required by the local authority."

Now, I have listened to much argument on the meaning of the term "waterworks" in the 52nd section. I think I do not misrepresent the Plaintiffs' counsel in any way when I say it was admitted that the whole of those words in the 4th section, which that section enacts shall be included in the term "waterworks," are not introduced into the 52nd section. It is not necessary that I should point out that the definition clause contains the usual limitation that the words are to have the meanings assigned to them "if not inconsistent with the context." Many cases were put during the argument by way of illustration. In my opinion, this at least must be accepted as the true meaning of the Legislature. If there were existing waterworks owned by

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the local authority, the mere repair of those waterworks would not be within the meaning of the 52nd section. Then starting from that point, I heard many suggestions, and it was admitted that some slight enlargement of the existing waterworks would not be within the section: if, for instance, to their existing reservoir there were added some dozen square yards of additional work. That admission, I think, is perfectly correct, and I accept that as being within the true construction. It comes to this, therefore, that the prohibition in the 52nd section is not absolute, but one of degree; and then there comes the usual difficult question, at what particular point the Court, which has to declare the meaning of the Act of Parliament, shall make its stand. It was pointed out for the Plaintiffs that the new works were greatly in excess of the existing works, and, that being so, it was said that this was a construction of waterworks within the meaning of the section. Now, in my opinion, that section was not intended to apply to the case where the local authority had already, previously to the passing of the special Act incorporating a company such as the Plaintiffs', substantial waterworks in existence, and I say substantial waterworks because I bear in mind that the 4th section includes in the meaning of the term "waterworks" a pump, and I mention that for the purpose of shewing in what sense I used the term "substantial waterworks." In this case the Defendants had waterworks in the proper sense of the term in operation and existing at the time when the Plaintiff company was incorporated, and those waterworks have hitherto been accepted as, and have been in fact, sufficient for the requirements of the district of *Redcar*. There may, in course of time, be many things that occasion or justify alterations and additions to existing works. The illustration given—and it was a proper one—was, with reference to the filtration of water and the larger area that may be required. It seems to me it would be unreasonable to hold that Parliament meant by this 52nd section to say that a local board, which had already constructed, and had in operation, waterworks, could not improve those works. From this it seems to me to follow, that Parliament must have intended that they should be able to enlarge the waterworks already existing. I think in effect, if this be necessary for the purpose

of my judgment—and probably it is—that I ought to hold that the words "before commencing to construct waterworks" refer to new waterworks in the fair and reasonable sense of the term, and that those words do not apply to the improvement of, or additions to, existing waterworks, and I cannot see how I can safely stop at any particular point as to the degree of enlargement or the degree of improvement. I have pointed out that under the 75th section of the Act of 1848, which corresponds with the 51st section of the Act of 1875, the Defendant local board have authority to supply the district with water proper and sufficient for public and private purposes, and when they have that authority it appears to me that the 55th section is of importance, and that the 55th section binds them to provide and keep, in any waterworks constructed by them, a supply of pure and wholesome water. On the whole, it seems to me that the true reading of sects. 51 and 52 is such, that the Defendant local board is not under the obligation contended for by the Plaintiffs of giving them any notice before they proceed to execute the works which are contemplated. For these reasons I must refuse the motion.

[This application was subsequently by consent treated as the hearing of the action, which was set down, and dismissed with costs.]

Solicitors: *Howe & Rake*, agents for *Lucas, Hutchinson, & Meek, Darlington; Warriner & Kinch*, agents for *A. H. Sill, Redcar.*

W. C. D.

CHITTY, J.
1894
Nov. 13, 14.

SANGUINETTI *v.* STUCKEY'S BANKING COMPANY.

[1888 S. 232.]

Bankruptcy—Priority—Voluntary Settlement—Void "as against the Trustee"—Extent of Avoidance—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

The fact that a voluntary settlement has been set aside under sect. 47 of the *Bankruptcy Act*, 1883, as "void as against the trustee" in bankruptcy, does not entitle him to stand in the place of the beneficiaries under the avoided settlement, or give him, on behalf of the unsecured creditors, any priority over mortgagees and incumbrancers subsequent to the settlement.

Semble, the effect of such an order is to accelerate subsequent incumbrancers generally.

Action.

This was a foreclosure action, to enforce the Plaintiff's equitable charge, on the life interest of one *C. A. Messiter*, in certain real estates, in the county of *Somerset*, but the only question argued and decided which calls for a detailed report was, as to the effect of an order, under sect. 47 of the *Bankruptcy Act*, 1883, setting aside a voluntary settlement; the trustee in the bankruptcy contending, that the settlement was void as against him only, and not generally, and consequently, that he was entitled to the money comprised in the settlement for the benefit of the unsecured creditors, in priority to the Plaintiff's incumbrancers.

The material facts were shortly as follows:—

In 1876, *C. A. Messiter*, being then tenant for life of the said real estates, executed a post-nuptial settlement, whereby his life interest was charged with an annuity of £500 in favour of his wife and children.

On the 12th of March, 1883, *C. A. Messiter* executed another settlement, whereby an additional annuity of £800 was charged on the said real estates in favour of his wife and children.

On the 22nd of March, 1883, *C. A. Messiter* gave the Plaintiff a charge in writing on his life interest in the said real estates, and undertook when called upon to execute a legal mortgage.

On the 23rd of February, 1885, *C. A. Messiter* was adjudicated bankrupt, and one *T. J. Denman* was appointed trustee.

On the 27th of June, 1888, an order was made in the bankruptcy proceedings, on the application of the trustee, at the instance of, and under an indemnity from, the Plaintiff, with the consent of the parties beneficially interested under the said settlements, and by way of compromise, declaring that the settlement of 1876 was a valid settlement, and that the settlement of the 12th of March, 1883 was "void as against the trustee," as a voluntary settlement.

There was a considerable sum of money now in Court, representing accumulations of the £800 annuity, which had been paid in to the credit of this action without prejudice to the right of the trustee in bankruptcy, who was also one of the Defendants, to raise the question whether the avoidance of the settlement of the 12th of March, 1883, enured for the benefit of the unsecured creditors, or for the benefit of the Plaintiff and the other secured creditors only; and the Defendant, the trustee in bankruptcy by a counter-claim, asked for a declaration that he was entitled to the accumulations of this £800 annuity, and for payment of the same out of the funds in Court.

Levett, Q.C., and *George Henderson*, for the Plaintiff:—

There is nothing in sect. 47 of the *Bankruptcy Act*, 1883, or any of the other sections, which entitles the trustee to stand in the place of the beneficiaries under the avoided settlement, or which gives him any priority, on behalf of the unsecured creditors, over the secured creditors, and incumbrancers subsequent to the settlement. The principle laid down by *Ex parte Payne* (1), and *Ex parte Blaiberg* (2), which are analogous cases under the *Bills of Sale Acts*, applies to this case. The Defendant *Denman* is endeavouring to set up as against the Plaintiff, and the other puisne incumbrancers, a settlement which he himself has set aside. There is no ground for saying that the Defendant *Denman* has any priority over the Plaintiff, and he is not entitled to any such declaration as he asks by his counter-claim.

Kenyon Parker, and *J. W. Baines*, for subsequent incumbrancers, Defendants, adopted this argument.

(1) 11 Ch. D. 539. (2) 23 Ch. D. 254.

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Farwell, Q.C., and *Fossett Lock*, for the Defendant *Denman*:—

The settlement is void "as against the trustee," not void generally. Under the old *Bankruptcy Act* of 1 James I. c. 15, s. 5, after an instrument had been declared void as against the assignees in bankruptcy, a transfer and conveyance was directed in *Walker* v. *Burrows* (1). A conveyance is not necessary now, but the property vests in the trustee all the same; he stands in the place of the beneficiaries under the settlement, and gets priority over the mortgagees, who took their security subject to this settlement. The trustee is trustee for the unsecured creditors only, and it is for their benefit that the settlement is set aside as against him: we claim to take this £800 annuity in the same way as if the security for it, *i.e.*, the settlement, had been given up: *Cracknall* v. *Janson* (2).

A voluntary settlement by a bankrupt, though void as against his creditors, subsists for all other purposes: *Ex parte Bell* (3); and in the notes on sect. 47 in *Lee* and *Wace* on Bankruptcy (4), it is stated that this section appears to make a settlement coming within its terms, void as against the trustee only, and to leave it subsisting for other purposes. If the Plaintiff's contention is correct then no effect whatever is given to the words "as against" the trustee: We say "as against" the trustee must have meant, void only to the extent necessary to enable the trustee, on behalf of the unsecured creditors, to take the settled funds: *Ex parte Blaiberg* (5). The case of *Ex parte Payne* (6) is on another Act, and has no bearing on the present case. On these grounds the trustee is entitled to the declaration asked for by his counter-claim.

Levett, in reply.

CHITTY, J. (after stating the facts, and the way in which the question for decision had been raised in the pleadings, continued):—

The point that I have to consider is, the effect of the bankruptcy order of the 27th of June, 1888. The parties are agreed

(1) 1 Atk. 93.
(2) 6 Ch. D. 735.
(3) 1 G. & J. 282.
(4) 3rd Ed. p. 418.
(5) 23 Ch. D. 254, 258.
(6) 11 Ch. D. 539.

as to the circumstances under which that order was obtained. The application for the order appears to have been made by the trustee, on an indemnity given to him by the present Plaintiff, and the present Plaintiff being, as he claims to be, a secured creditor, and standing outside the bankruptcy proceedings in virtue of his security, was not a party to the order, and is not affected by it. So far as he is concerned, the order was *res inter alios acta*. But it is admitted on both sides, that the order was obtained for his benefit, subject to the question of whether the order would enure to his benefit or not. The Plaintiff seems to have considered that by obtaining this order there would be some benefit conferred upon him. Whether that is so or not does not depend upon what he may have thought of the matter. The parties served with notice of the application were apparently the persons beneficially interested under the settlements, namely, the trustee, the bankrupt's wife, and the bankrupt's children, of whom some were infants. I am not concerned to say whether the order made was binding upon the infants or not. I pass that by, not considering it to be a material question for the present purposes, since this action only raises the question between the Plaintiff on the one hand and the trustee in bankruptcy on the other. Whether there were guardians appointed for the infant children or not, I do not stay to inquire. The order was made by consent, and it was a compromise order. The consent is expressed on the face of the order; it was not the result of an adjudication by the Bankruptcy Court between the parties; but it is the embodiment in a declaration of the Court of the agreement which had been come to. Now, the Defendant, the trustee in bankruptcy, says that the settlement is declared to be void as against him only, and that therefore the result is, that it is not declared void as against the Plaintiff in the present action, and that proposition on the part of the trustee is correct. The only person who gets, on the face of the order, the benefit of the order is the trustee in bankruptcy. The order appears to have been made in virtue of the 47th section of the *Bankruptcy Act*, 1883, the provisions of which, shortly stated, are to this effect, that a settlement of property not in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for

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valuable consideration, or a settlement made on or for the wife or children of the settlor, of property which has accrued to the settlor after the marriage in right of the wife shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy; the settlement of 1883 fell, according to the agreement of the parties and the declaration founded on the agreement, within that portion of the section, having been made within two years of the bankruptcy.

It has been argued on the part of the trustee in bankruptcy, that he is a trustee for the unsecured creditors, and that proposition again I think is correct. The mortgagee, as here, stands outside the bankruptcy. He may come in under the bankruptcy, subject to the provisions relating to mortgagees who come in, and I accept the argument for the Defendant that the trustee in bankruptcy means the trustee for the general body of unsecured creditors, and that this avoiding against the trustee does not avoid in favour of a mortgagee for whom the trustee in bankruptcy is not a trustee. But that leaves the question open with regard to the effect of this order, and here a somewhat curious point seems to arise. The Defendant, as was shewn in the argument at the Bar, is claiming the benefit of the order as against the Plaintiff, and the argument is, that the settlement, being avoided against the trustee, is avoided for the benefit of the general body of unsecured creditors, and that the result is, that this proceeding, to which the secured creditors—namely, the Plaintiff and the other puisne incumbrancers in this suit, were not parties, has been to vest in the trustee the property which purported to pass by the settlement, which settlement, at the instance of the trustee, the Court of Bankruptcy has declared to be void as against him. I think that it is not an incorrect statement of the line of defence to say that the Defendant *Denman*, in the result of the argument, is endeavouring to set up as against the mortgagee incumbrancers (subject to whose title being a *bonâ fide* one, the property of the bankrupt vested in him), a settlement which he has himself, through the action of the Bankruptcy Court, and the consent of the parties, set aside—set aside, I agree, not generally; but set aside so far as relates to him.

Now, the 47th section of the *Bankruptcy Act*, 1883, does not use the term "fraud." No doubt, having regard to the course of legislation on this subject, the Legislature considered, without mentioning fraud on the face of the section, that the settlements referred to, with the exceptions mentioned, ought not to stand as against the trustee in bankruptcy. It is noticeable that settlements made in good faith for valuable consideration are excepted. I think it is not necessary for me to say whether the trustee has obtained that order against the settlement, on the footing that the settlement was fraudulent, but it comes somewhat near it; and I think the better mode of expressing myself is to say that it has been avoided under this section. But being avoided under that section against the trustee, does not in my opinion enable the trustee to say that this order, coupled with the 47th section and the other sections of the Act, had the effect of transferring to him all the beneficial interests of the parties who were interested in the settlement; that is to say, all the beneficial interest to the extent that would be required to answer the trustee's claim in the bankruptcy for the unsecured creditors. Whether the settlement is void or not void as against the incumbrancers, is a question left untouched by the 47th section, and, having regard to what has been admitted at the Bar, I am satisfied that the persons beneficially interested—at any rate those who were of age—do not deny the position taken up by the mortgagee that the settlement cannot be set up as against them. The parties have come here to have this one question decided, and this only—whether the effect of that order is to pass the property in the settlement to the trustee in bankruptcy. In my opinion the effect of that order is not such as is contended for. It would be strange that that section should have the effect of vesting the property comprised in the settlement in the trustee, as against persons who claim to be incumbrancers or mortgagees outside the bankruptcy.

In my opinion the principles established by *Ex parte Payne* (1) and *Ex parte Blaiberg* (2), cited at the Bar, apply to this case, and I cannot find any just or sufficient ground for saying, consistently with the course of authority on this subject, that the property

(1) 11 Ch. D. 539. (2) 23 Ch. D. 254.

CHITTY, J. 1894 SANGUINETTI v. STUCKEY'S BANKING COMPANY.

has passed to the trustee in bankruptcy, that is, the property that was comprised in the settlement. I am strongly impressed with the peculiar position taken up by the trustee in bankruptcy. when he says that the very document that he had set aside as against himself, is still a document or a settlement that he can set up as against the Plaintiff.

The result is, I think that the Defendant *Denman* has not succeeded in establishing any priority, and I therefore decline to make any such declaration as is asked for in his counter-claim.

Solicitors: *Richard Furber; Rowcliffes, Rawle & Co.*, agents for *J. Trevor Davies, Sherborne, Dorset; George J. Coldham.*

W. C. D.

CHITTY, J. 1894 *Nov.* 8, 20.

BELL *v.* EARL OF DUDLEY.

[1894 B. 4467.]

Inclosure Act—General Rules for Construction of Inclosure Acts—Separate Ownership of Surface and Minerals—Right to work Minerals—Right to Support—Damage to Surface Owner—Right to let down Surface—Burden of Proof—Clear Words—Compensation Clause, Presence or Absence of.

In construing Inclosure Acts each Act has to be interpreted according to its own provisions.

The general rules for the construction of such Acts are the following:—

Where the ownership of the minerals and of the surface is severed, the *primâ facie* inference is that the owner of the surface shall enjoy the surface allotted, and shall have the common right of support for his tenement.

In order to rebut this inference the burden lies on the owner of the minerals to shew affirmatively and by clear words that he has the right of letting down the surface. But express words are not required.

The presence or absence of a compensation clause is an important element in the construction of such Acts. The *primâ facie* inference in favour of the surface owner is strengthened by the absence of any provision for compensation, though the presence of a limited compensation clause is not of itself sufficient to rebut the inference.

MOTION.

The Plaintiff was the owner of certain premises erected on land which had been allotted to his predecessors in title under

the *Kingswinford Inclosure Act*, 1784 (24 Geo. 3, 2nd Session, c. xviii.).

By this Act it was, amongst other things, provided that an allotment of one-sixteenth of the whole, and such further part as the Commissioners determined, should be made to the lord of the manor in full compensation for the right of soil and right of free warren in and over the wastes, and of his beneficial enjoyment in the commonable woods; and after providing for certain special allotments the Act directed that the residue of the lands should be allotted to the commoners in full satisfaction of their commonable rights.

By the first part of the following clause it was provided that nothing in the Act contained should prejudice the right or interest of the lord of the manor to all the mines of coal and other minerals specified, and all other mines and minerals whatsoever, except as therein mentioned, but that he should at all times thereafter have, hold, enjoy, raise, get, take, and carry away all such mines and minerals as fully and effectually to all intents and purposes as he might have had, held, and enjoyed the same before the passing of the Act.

The second part of the same clause conferred on the lord and his successors the fullest powers for working the mines and minerals reserved to him, and concluded as follows: "Together with full and free liberty power and authority to and for him and them to do any other reasonable and necessary acts and things in and upon the same lands woods and grounds for the discovery getting working converting fetching carrying away selling and disposing of the mines and minerals in such manner as he or they shall think proper and expedient without any molestation or interruption and without paying or making any satisfaction to any person or persons whomsoever for the same or for the damage to be done thereby he and they doing as little damage thereby as may be."

The next clause commenced with the following recital: "And whereas great damage may be done to some of the said allotments by reason of searching for and working the said mines and minerals," and provided that by means of contribution the damage caused to any particular allotment by the working of

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the mines or the exercise of any of the powers reserved to the lord should be borne rateably by all the allottees, including the owner for the time being of the allotment damaged, and the allotment specially made to the lord.

The Defendant, who was the present lord of the manor, having commenced to work the mines under the Plaintiff's premises, with the probable result of letting down the surface of the land on which they stood, the Plaintiff now moved to restrain the Defendant from working the mines so as to cause a subsidence.

Levett, Q.C., and *Ashton Cross*, in support of the motion :—

If by the operation of this Act the owner both of the surface and the minerals parts with the surface, reserving to himself the minerals, with power to get them and to destroy the surface in so getting them, then the intention of the Legislature must be expressed in language as to which there can be no reasonable question or doubt, and that cannot be said of the clauses in this Act relating to damage and compensation by contribution. Although the term "great damage" is used, the "damage" there referred to cannot be held to include damage by subsidence. We rely upon the decision in the case of *Bell* v. *Love* (1).

Byrne, Q.C., and *W. F. Hamilton*, for the Defendant :—

Before the Act was passed both the surface and the minerals were in the lords of the manor, and they had a perfect right to let down the surface so long as they did not thereby interfere with the rights of common. After the passing of the Act the right of the lords to the working of the mines was to remain as it existed before the Act; but if the contention of the Plaintiff is correct, he can prevent the Defendant from working the mines at all. The lord has the right to work the mines, though the effect of it may be to let down the surface. Regard must be had to the language of the Act; it need not say in express terms that the mineral owner may let down the surface: express words are not required: *Duke of Buccleuch* v. *Wakefield* (2).

If the words are otherwise clear, the presence or absence of a compensation clause is immaterial; it is only where they are

(1) 10 Q. B. D. 547; 9 App. Cas. 286. (2) Law Rep. 4 H. L. 377.

ambiguous that the presence or absence of such a clause becomes material.

This case is almost on all-fours with that of *Consett Waterworks Company* v. *Ritson* (1), where the Court of Appeal reversed the judgment of the Court below, and held that the defendant had the right to work the mines so as to let down the surface of the land.

Levett, in reply :—

The case of *Duke of Buccleuch* v. *Wakefield* (2) was decided on the ground that the provisions of the Act gave full and complete compensation to the surface owner, which distinguishes that from the present case.

1894. Nov. 20. CHITTY, J.:—

The question which arises on this motion is simply one of right, depending on the true construction of the *Kingswinford Inclosure Act* of 1784.

The Defendant is working the coal mine in a reasonable and proper manner. It is not contested that the probable result of his workings, if continued, will be to let down the surface of the land on which the Plaintiff's brewery stands. The Plaintiff claims the absolute right of support; the Defendant claims the right to work the mine in a proper manner without regard to the effect of the workings upon the surface.

Questions of this kind, turning on Inclosure Acts, have often come before the Courts in recent years. The Acts which have thus received judicial interpretation have not been drawn on the same model: when compared one with another they have presented points of resemblance and of difference, leading to different results. The Act before me in some respects resembles —and in others differs from—any of the Acts the meaning of which has been ascertained by the Courts. Each Act has to be interpreted according to its own provisions. The leading authority relied on by the Plaintiff is *Bell* v. *Love* (3), a decision of the Court of Appeal which was affirmed by the House of Lords; the

(1) 22 Q. B. D. 318, 702. (2) Law Rep. 4 H. L. 377.
(3) 10 Q. B. D. 547; 9 App. Cas. 286.

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leading authorities cited for the Defendant are *Duke of Buccleuch* v. *Wakefield* (1) and *Consett Waterworks Company* v. *Ritson* (2), where the decision of the Divisional Court was reversed by the Court of Appeal (3). In the LAW REPORTS there is merely a short report of the decision of the Court of Appeal; a shorthand note, however, of the judgments delivered was produced and read in Court on the hearing of this motion.

These authorities afford great assistance and serve as guides in travelling through the various clauses of this Act of Parliament. The result appears to be that the method adopted in construing these Acts may be stated as follows: Where, as here, the ownership of the minerals and of the surface is severed, the *primâ facie* inference is that the owner of the surface shall enjoy the surface allotted, and shall have the common right of support for his tenement. This inference is strong; in order to rebut it the burden lies on the owner of the minerals to shew affirmatively and by clear words that he has the right of letting down the surface. When clear words are spoken of, it is not meant that the Act must say in express terms that the mineral owner may let down the surface. That such express words are not required is shewn by *Duke of Buccleuch* v. *Wakefield*, and by the decision of the House of Lords on a Scotch instrument in *Buchanan* v. *Andrew* (4).

The presence or absence of a compensation clause is an important element: the *primâ facie* inference in favour of the surface owner is strengthened by the absence of any provision for compensation; the presence of a limited compensation clause is not of itself sufficient to rebut the inference. There was such a limited clause in *Bell* v. *Love* (5), where the right to compensation was given, not to the person entitled to the allotment, but merely to the person in possession for the time being, and the amount was not to exceed the sum of £5 yearly. Such, stated shortly, appears to be the method pursued in interpreting Acts of this class; whether the propositions I have stated ought to be called a method of interpretation, or to be termed reasons or

(1) Law Rep. 4 H. L. 377.
(2) 22 Q. B. D. 318.
(3) 22 Q. B. D. 702.
(4) Law Rep. 2 H. L., Sc. 286.
(5) 10 Q. B. D. 547.

rules, or (as Lord Justice *Lindley* said, in his judgment delivered in the case of *Consett Waterworks Company* v. *Ritson*) "subordinate rules" for construing the Act is a matter of no moment: the object is the same whatever be the correct phrase; that object is to ascertain the intention of the parties to the contract embodied in the Act of Parliament.

The lands inclosed under the Act comprised upwards of 1300 acres by estimation according to the preamble, and not less than 1500 acres according to the evidence. The lands appear to have been waste lands or open moor, and some woods. The most valuable mineral underlying the lands is coal of great thickness. The thickness of the seam under the Plaintiff's ground is thirty feet, and for the security of the surface and the Plaintiff's brewery standing thereon it would be necessary to leave no less than about an acre and a half of coal ungotten. The coal extends under by far the greater part of the inclosed lands, and if the Plaintiff's contention is right a very large part of the coal must remain unworked. The coal has been worked for upwards of 200 years, and the surface has necessarily been let down. The preamble of the statute recites the title of the Defendant's predecessor as lord of the manor; that the waste lands afforded very little profit, but were capable of great improvement, and would, if divided and inclosed so as to be converted into tillage, be of great advantage to the persons interested therein. Thus improvement by tillage was, but improvement by the erection of buildings was not, directly contemplated. The more material of the enactments are the following: An allotment of one-sixteenth of the whole, and such further part as the Commissioners determined was to be made to the lord of the manor in full compensation for his right of soil, right of free warren and coney warren in and over the wastes, and of his beneficial enjoyment in the commonable woods. After providing for certain special allotments the Act directed that the residue of the lands should be allotted to the commoners in full satisfaction of their commonable rights. This is immediately followed by a long and important clause relating to manorial rights and the right to get and work mines. The clause is introduced, not merely by way of proviso, but also as a direct enactment and declaration. It divides itself

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into two parts. The first part contains a reservation proper; the second, on the face of it, goes beyond mere reservation. The substance of the first part is that nothing in the Act contained shall prejudice the right or interest of the lord of the manor to all the mines of coal and other minerals specified, and all other mines and minerals whatsoever, except common brick clay and common freestone and rubble; but he shall at all times thereafter have, hold, enjoy, raise, get, take, and carry away all such mines and minerals as fully and effectually to all intents and purposes as he might have had, held, and enjoyed the same before the passing of the Act, or in case the same had never been made, and for that purpose may use all pits then existing.

The second part of the clause begins with the words "together with full and free liberty power and authority" to the lord. The clause is too long to quote; it is sufficient to say that it confers on the lord and his successors the fullest powers for working the mines and minerals reserved to him. It ends thus: "Together with full and free liberty power and authority to and for him and them to do any other reasonable and necessary acts and things in and upon the same lands woods and grounds for the discovery getting working converting fetching carrying away selling and disposing of the said mines and minerals in such manner as he or they shall think proper and expedient without any molestation or interruption and without paying or making any satisfaction to any person or persons whomsoever for the same or for the damage to be done thereby, he and they doing as little damage thereby as may be." This is a strong clause in favour of the Defendant. Although it was known at the time that the Act was passed that the working of the coal had caused subsidence in the surface, and, indeed, that it was impracticable to work the thick seam of coal without such subsidence, the words import that the lord may work the mines without making any satisfaction to any person or persons whomsoever, the latter words of course including the allottees.

This clause is itself immediately followed by a compensation clause; this, again, is a long clause. The effect of it is that by means of contribution the damage caused to any particular allotment by the working of the mines or the exercise of any

of the powers reserved to the lord is borne rateably by all the allottees, including the owner for the time being of the allotment damaged, and the allotment specially made to the lord. The lord himself is thus required to make a substantial contribution to the damage sustained by his mining operations. There is no limit to the amount of the damage to which contribution has thus to be made by the allottees. It was argued for the Plaintiff that it could not have been intended that this compensation clause should extend to damage caused by subsidence. But I cannot accept this argument; the words of the enactment are sufficient to include all damage, and I can find no sufficient ground for excluding this important and (as I think) obvious head of damages. The preamble of the section is most significant. It runs thus: "And whereas great damage may be done to some of the said allotments by reason of searching for and working the said mines and minerals within and under such allotments, and making such ways and exercising such other powers and liberties as aforesaid by the said Lord Viscount *Dudley* and *Ward* and the future lords of the said manor and it is reasonable that the proprietors of the several other allotments to be made and set out by virtue of this Act should bear and pay a proportionable part of such damage: be it therefore enacted." Great damage is there expressly mentioned and directly contemplated, and a special scheme is provided for relieving by compensation the allottee suffering the damage from all but his aliquot proportion of the loss sustained. It is impossible to say that "great damage" does not include damage caused by subsidence.

Putting, then, the various parts of the Act together and reading the Act as a whole, I come to the conclusion that the Defendant has made out his claim, and that the Plaintiff is not entitled to the injunction he asks for.

Solicitors: *Stanley Attenborough & Tyer; Saltwell, Tryon, & Saltwell.*

G. M.

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[1893 N. 1866.]

Vendor and Purchaser—Condition limiting Commencement of Title—Prior Title not to be objected to—Objection to Prior Title as shewn aliunde—Application for Return of Deposit—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78).

Upon a sale of land as belonging to the vendors in fee one of the conditions of sale provided that the title should commence with a conveyance dated in 1869, and that the prior title "shall not be required, investigated, or objected to." The purchaser refused to complete his purchase, and took out a summons under the *Vendor and Purchaser Act*, 1874, for the return of his deposit, on the ground that he had discovered *aliunde* that, by reason of the will of a testator who died prior to 1869, the grantor in the deed of 1869 had only a life estate in the property, and that consequently the vendors could not shew a title to the fee:—

Held, that the purchaser was bound by the condition; that it precluded him from raising the objection to the title, and that the summons must be dismissed.

But, whether the vendors could enforce specific performance of the contract, *quære*.

Darlington v. *Hamilton* (1) discussed.

SUMMONS under the *Vendor and Purchaser Act*, 1874, by a purchaser of real estate, asking that it might be declared that the vendors, the *National Provincial Bank of England*, had not shewn a good title to the property comprised in the contract of sale, and that they might be ordered to repay to the purchaser the deposit paid by him upon the sale, with interest thereon.

The Bank were mortgagees of the property, which they sold under their power of sale. The property was put up for sale by auction as freehold, subject to certain conditions of sale, the 3rd of which was as follows: "The title shall commence with an indenture of conveyance on sale dated the 23rd January, 1869, and the prior title, whether appearing in any abstracted document or not, shall not be required, investigated or objected to." That deed recited that the vendor was seised in fee, and did not refer to the earlier title.

(1) Kay, 550.

At the sale *George Marsh* was declared the purchaser of the property for £315. He paid a deposit of £31 10s., and signed a contract, by which he agreed to pay the remainder of the purchase-money, and to complete his purchase, according to the conditions.

After the delivery of the abstract of title the purchaser's solicitor discovered *aliunde* that a Miss *Davis*, who had conveyed the property in fee by the deed of the 23rd of January, 1869, to the bank's mortgagor, derived title under the will, dated in 1865, of a testator who died prior to 1869. The purchaser was advised that under that will Miss *Davis* had only an estate for life in the property. The vendors had endeavoured, without prejudice to any question, to remove this objection: but as the will gave some property to Miss *Davis* for life, and other property to her in fee; and the properties were distinguished by reference to their occupation only, and it had become extremely difficult, by lapse of time, and deaths of tenants, to obtain satisfactory evidence as to the occupation of the properties nearly thirty years ago; the attempt had failed. Ultimately the purchaser declined to complete his purchase without the concurrence of the alleged remainderman; and the present summons was taken out.

B. B. Rogers, for the purchaser.

Beaumont, for the vendors, objected that the 3rd condition precluded the purchaser from objecting to the title prior to the deed of the 23rd of January, 1869.

B. B. Rogers, for the purchaser:—

If the purchaser can shew outside the abstract which has been delivered that the vendors' title is bad, he will be allowed to do so, notwithstanding the condition: *Warren* v. *Richardson* (1); *Shepherd* v. *Keatley* (2); *Darlington* v. *Hamilton* (3); *Else* v. *Else* (4); *Waddell* v. *Wolfe* (5); *Jones* v. *Clifford* (6); *Smith* v. *Robinson* (7).

(1) You. 1.
(2) 1 C. M. & R. 117.
(3) Kay, 550.
(4) Law Rep. 13 Eq. 196.
(5) Ibid. 9 Q. B. 515.
(6) 3 Ch. D. 779.
(7) 13 Ch. D. 148.

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Beaumont, for the vendors :—

It might perhaps be difficult to enforce specific performance if the vendors' title were really shewn to be bad, notwithstanding such a condition as this. But the vendors are not asking for specific performance. There is no case in which such a condition has been held invalid, and, if it is good, the words are sufficient to preclude the purchaser upon such an application as this from in any way relying on a defect previous to the stipulated root of title: *Hume* v. *Bentley* (1). The observations of Lord *Hatherley* in *Darlington* v. *Hamilton* (2) are not warranted by the earlier decisions to which he referred, and his own decision in that case did not go as far as is necessary to maintain the present summons: *Dart* on Vendors and Purchasers (3); *Fry* on Specific Performance (4).

B. B. Rogers, in reply :—

In no single case has the Court forced a title on a purchaser who can shew *aliunde* that the vendor cannot fulfil his contract.

[NORTH, J. :—It may be that specific performance would not be decreed; but that is a different thing from ordering a return of the deposit.]

There is jurisdiction on summons to order a return of the deposit: *In re Arbib and Class's Contract* (5). If it is open to the purchaser to raise the objection as a bar to specific performance, he can rely on it for all purposes.

NORTH, J. (after stating the facts, continued) :—

The question is, whether the purchaser, having, as he alleges, discovered *aliunde* that the vendors' title is defective, is entitled to have the whole transaction undone. It must be borne in mind that we have nothing now to do with the question of the specific performance of the contract. Without expressing any opinion about it, I can see that there might be a difficulty in the way of the bank if they were endeavouring to enforce specific performance. But this summons is equivalent to an

(1) 5 De G. & Sm. 520.
(2) Kay, 558.
(3) 6th Ed. vol. i. p. 169.
(4) 3rd Ed. p. 594.
(5) [1891] 1 Ch. 601.

action by the purchaser for the return of his deposit. [His Lordship read the 3rd condition.]

The deed of the 23rd of January, 1869, contains a recital that the then grantee was seised of the property in fee, and the condition provides that no objection or investigation shall be made as to the prior title. It is said that, though the purchaser is not entitled to make any requisition upon or objection to the earlier title, yet he is at liberty to shew *aliunde* that the vendors are not entitled to the property in fee. I will quote first from Lord Justice *Fry's* treatise on Specific Performance as giving the principle, and I will afterwards refer to the authorities on the point. At p. 594 of the 3rd edition the learned author says: "The cases on the question whether and how far the inquiry into title has been limited fall into two categories: first, where the stipulations of the contract preclude the purchaser from making requisitions upon or inquiries from the vendor as to his title,—which relieves the vendor from the necessity of complying with or answering any such requisition or inquiry, but does not prevent the purchaser from shewing, by any means in his own power, that the vendor's title is defective; and secondly, cases in which the stipulations preclude the purchaser, not only from making such requisitions upon and inquiries from the vendor, but from making any inquiry or investigation about the title anywhere;—which may quite validly be stipulated, and will generally, provided that the stipulation be clear, altogether preclude inquiry and investigation for every purpose. Of the first of these categories an illustration may be found in the case of *Darlington* v. *Hamilton* (1), where there was a stipulation that the lessor's title should not be produced, and the purchaser discovered that the lessor's title was objectionable by reason of its being involved with the title to other property, so that the purchaser would run the risk of being ousted by reason of a breach of covenant in respect of other property; and the Court accordingly refused specific performance. On the other hand, where the condition provided that the lessors' title should neither be produced nor inquired into, and the purchaser offered Acts of Parliament in evidence that the lessors (a public company)

(1) Kay, 550.

NORTH, J. had no power to grant leases, the objection was held to be precluded."

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The case of *Darlington* v. *Hamilton* (1) was clearly one of the first kind, in which the condition was not considered a bar to the purchaser's shewing that the vendor's title was defective. But some observations in the judgment of Lord *Hatherley* are relied on for the purchaser. I will consider those observations presently; but I should like first to refer to *Hume* v. *Bentley* (2). In that case, upon a sale by auction of leasehold premises, one of the conditions was, "the lessors' title will not be shewn, and shall not be inquired into." In a suit by the vendor for specific performance of the contract the purchaser objected that certain Acts of Parliament which he produced shewed that the lessors had no power to lease the premises. It was held that the condition provided that the lessors' title should not be shewn, and also precluded inquiry for every purpose, and specific performance was accordingly decreed. The Vice-Chancellor *Parker* said (3): "As to the question upon the first of these exceptions, namely, whether it was open to the purchaser to object to the lessor's title, it arose purely upon the construction of the contract for sale. According to the ordinary rule, a vendor of leasehold property was under an obligation to shew the lessor's title; but there was no doubt that the vendor might stipulate that he should be relieved from that obligation; and in the case of *Shepherd* v. *Keatley* (4), a stipulation of that kind was held not to amount to a stipulation that the purchaser should be obliged to accept the title without objection or inquiry. If the purchaser could shew, by any means in his own power, that the vendor had a defective title, he might do so. There was no doubt, however, that the parties might stipulate beyond that, viz., that the purchaser must accept the title without inquiry or objection; that would be a lawful stipulation: and the Court put such a construction on the contract in *Spratt* v. *Jeffery* (5). Although comments had been made upon that case, there did not appear to be any inconsistency between it and the case of *Shepherd* v. *Keatley*. In one of those cases the Court

(1) Kay, 550.
(2) 5 De G. & Sm. 520.
(3) 5 De G. & Sm. 525.
(4) 1 C. M. & R. 117.
(5) 10 B. & C. 249.

had construed the conditions of sale as more extensive in terms than in the other case. It might possibly be, that in *Spratt* v. *Jeffery* (1) the Court had erred in construing the contract as importing an acceptance of the lessor's title without objection; but there could be no doubt upon the authorities, that, if it had been a stipulation in the contract, that the purchaser should accept the title without objection or inquiry, that would be a lawful agreement. Here the contract was, that the title would not be shewn, and should not be inquired into. The question was, did that oblige the purchaser to accept the lessor's title, such as it was; or what was the meaning of the stipulation. Here, in addition to the term of the contract, that the title would not be shewn, other words were to be found to which this effect must be given, that the title should not be inquired into. The only reasonable meaning of that stipulation was, that inquiry was altogether precluded for every purpose. Now, the purchaser had called upon the Master to look into the vendor's title to some extent; and he had produced before the Master the Acts of Parliament which he asked the Master to look into. The purchaser was precluded from going into that inquiry by the terms of the fourth condition of sale. No force could be given to the words 'that the title should not be inquired into,' except as meaning that it should be accepted by the purchaser without objection or inquiry." I am unable to distinguish the condition in that case, that the lessor's title should not be inquired into, from the condition in the present case that the prior title "shall not be required, investigated, or objected to." In *Darlington* v. *Hamilton* (2) the condition was only that the purchaser shall not require proof or production of the lessor's title or any title prior to the lease; and it was held by Lord *Hatherley* that this did not preclude the purchaser from shewing *aliunde* that the lessor's title was defective, and accordingly specific performance of the contract was refused. But, no doubt, the learned Judge made this observation: "It is quite clear, according to the doctrine referred to and confirmed in *Warren* v. *Richardson* (3) and *Shepherd* v. *Keatley* (4), that, whatever may be the terms of

(1) 10 B. & C. 249.
(2) Kay, 550, 558.
(3) You. 1.
(4) 1 C. M. & R. 117.

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the condition of sale, if the purchaser obtain information *aliunde* that the title of the vendor is not clear and distinct, he has a right to insist upon the objection." It is said that this covers every possible case; but I am not aware of any authority for the proposition there stated. And in *Dart* on Vendors and Purchasers (1) it is said: "The doctrine laid down in the second paragraph of the judgment in *Darlington* v. *Hamilton* (2) that whatever may be the terms of the condition of sale, if the purchaser obtain information *aliunde* that the title of the vendor is not clear and distinct, he has a right to insist upon the objection, appears to be too broadly stated." I think the actual decision in *Darlington* v. *Hamilton* was clearly within the authorities, the condition being only that "the purchaser shall not require proof or production of the lessor's title, or any title prior to such lease." But, when the cases to which Lord *Hatherley* referred, as justifying the larger proposition which he stated, are examined, I do not think they bear out what he said. In *Warren* v. *Richardson* (3) the suit was for the specific performance of an agreement to accept a lease, and the Court, considering the defendant by his conduct to have waived all objections to the vendor's title, decreed specific performance. But at a later period, in settling the lease, it became necessary for the vendor, in order to identify the premises, to produce before the Master the original lease under which the plaintiff was entitled to the property, and as that production shewed that a sufficient lease could not be made to the defendant according to the agreement, the Court declined to enforce specific performance. No question arose as to the effect of a condition of sale. *Shepherd* v. *Keatley* (4), again, was an entirely different case from the present. There, on a sale of leasehold property, one of the conditions of sale was, that the vendor "should not be obliged to produce the lessor's title," and, the purchaser having *aliunde* discovered certain defects in the lessor's title, it was held, in an action for breach of contract against the purchaser, that, notwithstanding the condition, he was entitled to insist upon those defects. That condition was entirely different from the condition in the present

(1) 6th Ed. vol. i. p. 169, n. z.
(2) Kay, 550.
(3) You. 1.
(4) 1 C. M. & R. 117.

case, that "the prior title shall not be required, investigated, or objected to." The present case falls clearly within the second of the categories stated by Lord Justice *Fry*, and I think the *dictum* of Lord *Hatherley* in *Darlington* v. *Hamilton* (1) goes too far. It professes to be founded upon two cases which do not really warrant it.

What, then, are the other cases which have been relied upon? The first is *Else* v. *Else* (2). There a sale was made by the Court of Chancery under conditions which precluded the purchaser from making any objection or requisition in respect of any title prior to the document chosen as the root of title. The purchaser inquired into the prior title, and refused to complete, on the ground that the prior title was bad. The Court was of opinion that the objection was well founded; and held that, the sale being by the Court, the purchaser was not precluded by the conditions from raising the objection, and that he ought to be discharged from his purchase. But Lord *Romilly*, M.R., said (3): "I do not mean to express any opinion as to how the Court would look at this question if it arose between two strangers." I do not see that that has any application to the present case.

Then *Waddell* v. *Wolfe* (4) was relied upon by both sides. There leasehold premises were put up for sale subject to a condition that the abstract of title should commence with a specified indenture of underlease, and "it shall form no objection to the title that such indenture is an underlease, and no requisition or inquiry shall be made respecting the title of the lessor or his superior landlord, or his right to grant such underlease." The purchaser discovered that the grantor of the underlease had previously to the date thereof mortgaged the premises, and objected that, the legal estate being outstanding, the grantor had no power to grant the underlease, and it was held that the purchaser was not precluded by the condition from taking the objection. The objection that the indenture was an underlease was expressly excluded, and the rest of the condition related to the earlier title. Mr. Justice *Blackburn* said (5): "The principle

(1) Kay, 558.
(2) Law Rep. 13 Eq. 196.
(3) Law Rep. 13 Eq. 201.
(4) Ibid. 9 Q. B. 515.
(5) Law Rep. 9 Q. B. 519.

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which ought to guide us in construing conditions of sale is very accurately expressed in *Hume* v. *Bentley* (1)." Then he read the passage which I have already quoted, and continued:— "Now the question is, what construction are we to put on the 6th condition? Does it sufficiently appear that the parties have by their agreement stipulated that the title, though bad, shall be accepted without objection, or does it mean that the vendor is merely relieved from answering requisitions on title? In *Hume* v. *Bentley* (2) the words were very strong: 'The vendor shall at his own expense deliver to the purchaser a proper abstract of the title; but recitals or statements in deeds or wills dated twenty years ago shall be received as conclusive evidence of the matters or particulars stated therein; and the lessor's title will not be shewn, and shall not be inquired into.' Construing the last sentence of that condition with what went before, it distinctly shewed that the vendee was precluded from inquiring into the vendor's title, and *Parker*, V.-C., came to a right conclusion. In the present case the words are: 'It shall form no objection to the title that such indenture is an underlease, and no requisition or inquiry shall be made respecting the title.' If the vendor meant to express that, whatever the title was, the vendee was bound to accept it, he should have said so in clear and unambiguous words. A distinction appears to me to be made in the condition between 'objection' to the title and 'requisitions' on title. The construction I put upon the condition is, that no objection shall be made to the title that the indenture is an underlease, and that no requisitions on title shall be made." This view was expanded by Mr. Justice *Quain* and Mr. Justice *Archibald*, who held that the condition was equivalent to saying that no inquiry should be made as between the vendor and the purchaser. Mr. Justice *Quain* said (3): "The word 'inquiry,' in the 6th condition, has not so wide a meaning as that word had in the condition in *Hume* v. *Bentley*, because the words there were 'the lessor's title will not be shewn and shall not be inquired into.' Evidently pointing, therefore, to inquiries from all quarters and in all ways; whereas I think, in the present case,

(1) 5 De G. & Sm. 525. (2) 5 De G. & Sm. 520.
(3) Law Rep. 9 Q. B. 521.

the stipulation points to inquiries and requisitions between the vendor and purchaser." That case does not, I think, assist the present purchaser. It was pointed out there that a condition that the purchaser should accept the title shewn without inquiry or objection would be a good condition, and that is the very condition with which I have now to deal.

Again, in *Jones* v. *Clifford* (1), the defendant contracted to buy from the plaintiff freeholds and leaseholds, on the condition that he should assume that *E. M.*, who died in 1841, was seised in fee of the freeholds, and should not "require the production of or investigate or make any objection in respect of, the prior title." After the defendant had accepted the title, and before completion, he contracted to sell the property to a sub-purchaser, who discovered from an inclosure award prior to 1841 (as to the effect of which both the plaintiff and the defendant had been mistaken), that the freeholds had never belonged to *E. M.*; but that at the date of the contract the freeholds belonged to the defendant in fee, subject to a leasehold interest in the plaintiff. It was held that the defendant was not precluded by the condition or by his acceptance of the title from taking the objection, and that the Court would not decree specific performance. The decision was based on the ground that there had been a mutual mistake. Vice-Chancellor *Hall* said (2): "It has been said that, even if it is made out that the purchaser has bought his own property, yet that, having regard to the terms of the contract and the law, he ought to be compelled to complete his purchase and pay for that which is his own. The cases are divisible into two classes: first, cases in which the terms of the contract preclude the purchaser from making requisitions upon the vendor as to his title; and, secondly, cases in which they preclude him not only from making inquiries from the vendor as to his title, but from making any investigation anywhere about the title. A condition of the latter class is no doubt valid, but the Court has never yet gone so far as to hold that such a condition precludes a purchaser from saying to the vendor, at any rate before the completion of the contract, 'We have both been proceeding under a common mistake. You said the property was yours, but

(1) 3 Ch. D. 779. (2) 3 Ch. D. 790.

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I now find by some document which I have seen that it is mine, and the contract which you are asking me to complete is one without consideration, for I shall be paying the purchase-money and getting nothing for it.' The condition has never been construed to include such a case as that. And where there has been such a common mistake, and there is no fraud, the Court will not, in a suit for specific performance, compel the purchaser to complete such a contract."

One other case was referred to—*Smith* v. *Robinson* (1). In that case freehold property was sold in 1877 subject to a condition that the title should commence with a deed dated the 30th of December, 1867, and that no earlier or other title should be required or inquired into by the purchaser, and it was held that this condition did not preclude the purchaser from insisting on an objection to the prior title which was not discovered through any inquiry made by him, but was accidentally disclosed by the vendor. Mr. Justice *Fry* said (2): "The first question is, whether the purchaser is precluded by the condition from raising the objection which he has raised. In my opinion he is not. The condition precludes the purchaser from doing two things: first, from making any requisition on the earlier title; and, secondly, from making any inquiry into it. It does not preclude the vendor from disclosing or admitting some blot on his title about which the purchaser does not inquire. And that is what the vendor has actually done. He has himself confessed the objection to the title; it has not been discovered by the purchaser. If I were to hold that the condition applied, I should be stretching its meaning. Similar conditions have in many cases, such as *Waddell* v. *Wolfe* (3), been construed strictly. . . . It appears to me that the condition cannot apply to a case where the vendor has himself raised the difficulty and confessed the cloud on his title." That case was very similar to *Warren* v. *Richardson* (4).

Looking, then, at all these cases, what is there to shew that such a condition as that in the present case is not a valid one? I do not find that any of the cases referred to support that contention, except the observations of Lord *Hatherley*, which I

(1) 13 Ch. D. 148.
(2) Ibid. 151.
(3) Law Rep. 9 Q. B. 515.
(4) You. 1.

have read, and which are in favour of the purchaser. But those observations profess to be founded upon two cases which, when they are examined, do not bear out the view of the learned Judge: and *Hume* v. *Bentley* (1), which has often been cited with approval, is a decision directly to the contrary. I am not now deciding that the purchaser is bound to accept the vendors' title, if it should turn out to be a bad one; and I do not know whether the title is good or bad. I can see no reason why such a condition should not be imposed, and upon its construction I think the purchaser is not entitled to make this application. I must dismiss the summons; but I think it is not a case for giving costs.

Solicitors: *Robins, Hay & Co.; Wilde, Berger, & Moore.*

(1) 5 De G. & Sm. 520.

W. L. C.

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Oct. 27; *Nov.* 15.

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[1891 B. 4196.]

Costs— Taxation—Items barred by Statute of Limitations—Costs, Charges, and Expenses of Trustees—Costs payable by Trustees to their Solicitors—Voluminous Correspondence used at Trial—Discretion and Duty of Taxing Master.

By the judgment in an action it was referred to the Taxing Master to tax as between solicitor and client the costs of the retiring trustees of a settlement, including therein any charges and expenses that had been properly incurred by them as such trustees, and they were to pay and retain such costs when taxed out of the capital moneys subject to the trusts of the settlement. The bill of costs carried in by the trustees included items for costs which were statute-barred. Some of these amounts had been actually paid by the trustees to their solicitors after they were barred, and others remained unpaid, but the trustees desired to pay them:—

Held, that the object of the direction for taxation was to give effect to the trustees' right of indemnity, which extended not merely to claims which could be enforced by action, but to all fair claims of every kind, and that therefore these costs, which the trustees had properly incurred, and which were paid or payable to their solicitors, ought, notwithstanding that they were statute-barred, to be included in the costs which were to be paid and retained out of the capital moneys subject to the settlement.

The allowance on taxation of the costs of copies of correspondence used at the trial of an action is a matter for the discretion of the Taxing Master; but in exercising his discretion he ought to ascertain what part of the correspondence was in his judgment necessary and proper to be supplied to counsel and the Court for the proper argument and decision of the case. Where, in answer to objections to his taxation of the costs of such a correspondence, the Taxing Master merely stated that he had allowed one-third, *i.e.* 1159 folios, "which in his judgment and discretion comprised all that was necessary and proper to allow," the matter was referred back to him; but, on his reporting that he had reconsidered the matter from the point of view above indicated, and had arrived at a conclusion not substantially differing from that at which he had previously arrived, a summons to vary his certificate was dismissed.

ADJOURNED SUMMONSES to vary Taxing Master's certificates.

Samuel Budgett, who died in April, 1851, by his will dated the 11th of March, 1851, gave real and leasehold estate to his three

sons, *James Smith Budgett*, *William Henry Budgett*, and *Samuel Budgett*, upon certain trusts during the life of his wife, and after her death he gave one fourth share to his daughter *Sarah Ann Budgett* for her separate use, and the remaining three-fourth shares equally between his sons.

In the year 1864 the testator's daughter was married to *Edward Ebenezer Meakin*. Previously to her marriage a partition suit was brought by her against her brothers, and in that suit an order was made for the sale of her share to her brothers, on terms which appeared to the Court to be beneficial to her.

The sale was carried out, and the purchase-money was made the subject of a settlement (of which *James Smith Budgett* and *William Henry Budgett* were trustees), executed on the occasion of her marriage.

It was subsequently discovered that the testator was entitled to freehold lands in the *United States of America*, which had been overlooked when the suit was brought, and consequently were not included in the sale sanctioned by the order of the Court; and, in the year 1891, the present action was brought by *James Smith Budgett*, as Plaintiff, against *William Henry Budgett*, *Samuel Budgett* (the son), *Edward Ebenezer Meakin*, and *Sarah Ann Meakin*, as Defendants, for partition or sale of the American lands.

Edward Ebenezer Meakin and *Sarah Ann Meakin* put in a defence and counter-claim, to which *James Smith Budgett*, *William Henry Budgett*, *Samuel Budgett* (the son), and one *James Trounson*, were made Defendants, and thereby impugned the proceedings in the former suit, and claimed that the sale of the share of *Sarah Ann Meakin* to her brothers should be set aside as illegal and improper, that accounts should be taken on the footing of wilful default, and other relief grounded on breach of trust and improper conduct by the Plaintiff and the Defendants *William Henry Budgett* and *Samuel Budgett*, and that new trustees of the settlement might be appointed in the place of *James Smith Budgett* and *William Henry Budgett*.

The action came on for hearing and was tried before Mr. Justice *Romer* on the 11th, 13th, 14th, and 15th of July, 1893.

The opening of the defence to the counter-claim occupied

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more than a day, and on the hearing of it a voluminous correspondence, contained in six volumes, pages 1 to 1120, comprising 3477 folios, was put in evidence, consisting principally of letters between Mrs. *Meakin* and her brothers. Of these letters more than a hundred, forming a comparatively small proportion of the whole, were read.

In the result the charges of improper conduct made by the counter-claim were not sustained, or were withdrawn, and by the judgment pronounced by Mr. Justice *Romer* on the 24th of July, 1893, certain inquiries and accounts were directed, the counter-claim was dismissed, it was referred to the Taxing Master to tax the costs of the Plaintiff and the Defendants, *William Henry Budgett*, *Samuel Budgett*, and *James Trounson*, of the counter-claim up to and including the trial (with an exception of certain costs not material for the present purpose), and the Defendants *Edward Ebenezer Meakin* and *Sarah Ann Meakin* were ordered to pay to the Plaintiffs, *William Henry Budgett*, *Samuel Budgett*, and *James Trounson* respectively, their costs of the counter-claim when so taxed; and the Plaintiff and the Defendant *William Henry Budgett*, desiring to retire from the trusts of the settlement, a reference was made to Chambers to appoint new trustees in their place, and it was referred to the Taxing Master to tax the costs as between solicitor and client of the Plaintiff and the Defendant *William Henry Budgett* as trustees of the settlement, including therein any charges and expenses properly incurred by them as such trustees, and they were to pay and retain such costs when taxed out of the capital moneys subject to the trusts of the settlement. The whole of the correspondence was entered in the judgment as read.

Subsequently to the judgment, *Albert Buchanan* and *William Harvie* were appointed new trustees of the settlement in the place of the existing trustees, and by an order dated the 3rd of April, 1894, were added as Defendants to the action.

On taxation the Taxing Master disallowed two-thirds of the costs of the correspondence, and the Plaintiff carried in objections to such disallowance. On the other hand, the Defendants *E. E. Meakin* and *Sarah Ann Meakin* objected that the amount allowed was excessive.

The Taxing Master (Mr. *H. S. Ryland*) answered the objections of the Plaintiff as follows:—

"The correspondence, the subject of this objection, notwithstanding its length, 3477 folios, was examined and considered by me carefully on more than one occasion, the Defendants so strongly objecting to its propriety. I gave the matter all the attention of which I am capable, and exercised my discretion upon it to the best of my ability. The fact that the said correspondence is entered in the judgment as read does not affect my discretion. The length of the correspondence was so exceptional (3477 folios) that counsel found it impracticable to work upon it, and required the objectors' solicitors to make an epitome of it. Of the 3477 folios, after mature consideration, I allowed one-third, *i.e.*, 1159 folios, which in my judgment and discretion comprises all that was necessary and proper to allow. The item in question involves a considerable sum, six copies having been allowed, which together amount to £115 18*s.* 0*d.* If the whole of the correspondence be allowed, as contended for by the objectors, the amount would be £347 14*s.* 0*d.* For the reasons herein appearing I have overruled the Plaintiff's objections."

The Plaintiff then took out a summons asking that his objections to the taxation might be allowed, and that it might be referred back to the Taxing Master to vary his certificate accordingly.

The bill of costs carried in by the Plaintiff and the Defendant *William Henry Budgett*, as trustees of the settlement, comprised several items for costs incurred by them the recovery whereof was barred by the *Statute of Limitations*. These items consisted in part of amounts which had been actually paid by the trustees to their solicitors, notwithstanding that they were statute-barred, and in part of amounts which had not been paid, but which, in the judgment of the trustees, ought to be paid, and which accordingly they desired and intended to pay.

On the taxation the Defendant *Sarah Ann Meakin* objected to the allowance of all these items on the ground that they were statute-barred. The Taxing Master, though feeling considerable difficulty in allowing them, thought that the proper course was

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to certify them separately (*Curwen* v. *Milburn* (1)), and he accordingly did so, thus leaving it for the Court to determine whether they were to be paid or not.

The Defendant *Sarah Ann Meakin*, and the Defendants *Albert Buchanan* and *William Harvie* (the new trustees of the settlement), then took out a summons asking that the objections might be allowed, and that it might be referred back to the Taxing Master to vary his certificate accordingly.

The two summonses were adjourned into Court and came on together for hearing, but were argued separately.

Ingle Joyce, for the Plaintiff, in support of the first summons:—

The Taxing Master has arbitrarily allowed one-third only of the costs of the correspondence. He has not gone through it *seriatim* and indicated which letters were necessary and which were not. The trustees' case in answer to the charges made by the counter-claim depended in great part on the correspondence, and it was impossible for their advisers to know with certainty, before the action came on for hearing, what portions of the correspondence would, and what would not, prove to be material. The whole of it was entered in the judgment as read, and the costs of the whole of it ought to be allowed.

[KEKEWICH, J.:—My difficulty is, that the Taxing Master only says that the one-third which he has allowed "in his judgment and discretion comprises all that it was necessary and proper to allow." He does not say that it was all that it was necessary and proper to bring before the Court.]

Butcher, for the Defendants, *Sarah Ann Meakin*, *Albert Buchanan*, and *William Harvie*:—

The matter is one entirely for the discretion of the Taxing Master: see *Turnbull* v. *Janson* (2), where it was held that charges for copies of documents furnished to counsel are purely in the discretion of the Master. The Taxing Master says that he has carefully considered the matter, and exercised his discretion upon it. If he had merely adopted some rough-and-ready rule of thumb the Court might think it right to send the

(1) 42 Ch. D. 424. (2) 3 C. P. D. 264.

matter back to him for reconsideration, on the ground that he had not in fact exercised his discretion. But it is clear from his answers to the objections that he has done far more than that.

It is impossible to contend that because some of very voluminous documents are referred to on the trial of an action, and such documents are entered as read in the judgment, therefore the costs of all are to be allowed.

KEKEWICH, J.:—

I must send this back to the Taxing Master for a reason which I will state. The question whether any allowance ought to be made for copies of correspondence supplied to the Court and to counsel is one of very great importance. One has to bear in mind on the one hand the necessary provision for the administration of justice, and on the other the hardship which any extravagance in the matter of costs inflicts on suitors who no doubt sometimes find that litigation is an expensive luxury. One has to bear in mind those two points of difficulty, and to steer as well as one can between the two dangers. Having now had considerable experience as a Judge in trying witness actions, I confess to a strong opinion that in a large number of cases a well-arranged copy of the correspondence is, if not essential, at any rate extremely useful to the Judge to enable him to master the case as it goes along and to dispose of it; and if the Judge has it, of course counsel must have it; and not only so, but, if it is to be really useful, the counsel on both sides must have copies of the same character, paged in the same way. I have strongly urged on solicitors, however litigious, to agree that copies of correspondence should be made in that particular way. The inconvenience of having the letter of the plaintiff to the defendant handed up by the defendant's solicitor, who possibly does not find it at the right moment, and then the handing up of the answer to that by the plaintiff's solicitor, who may equally not have it immediately at hand, the delay and the trouble in referring to the documents from time to time, all increase the burden of litigation, the time occupied in it, and with the time the risk of those engaged insufficiently mastering the case, and of the Court failing to arrive at the proper judgment. All

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these considerations point to the necessity of a copy of correspondence being supplied; and I have often had occasion to complain that a copy has not been furnished to me. But the copy of correspondence, when furnished, is not always an unmixed good. Unfortunately the course adopted sometimes is to get all the correspondence together and copy it in order of date on separate pages, and when that has been accomplished—which is a very perfunctory way of performing the duty of a solicitor—it not unfrequently happens that some of the most important letters are left out, so that we have an incomplete copy on the one hand, and an overburdened copy on the other hand. Again, it frequently happens that counsel on opening a case hands in a copy of correspondence, and says that he does not think it necessary to refer the Court to any letters of an earlier date than one which he names, and all the rest are passed over as being unnecessary. My opinion is, that where the merits of the case turn on the correspondence—as in this case they undoubtedly did—a proper copy of the correspondence is so necessary for the administration of justice that the costs of it ought to be allowed, but only the costs of a proper copy in the sense which I have indicated. I follow Mr. *Butcher's* argument to this extent, that what is a proper copy of correspondence is entirely matter for the discretion of the Taxing Master—that is to say, the Court will not review his discretion unless inadvertently, or by some erroneous conclusion, he has omitted to allow important letters, or has included trumpery letters. There are matters on which the discretion of the Taxing Master must be reviewable. But it is within the discretion of the Taxing Master to say what is a proper copy of the correspondence. That unfortunately involves his mastering the whole case and the proceedings, seeing how counsel treated it, how the Judge treated it, what was read, what was not read, and so forth; and unfortunately, as sometimes there are letters of a trivial character mixed up with letters more important, it may be well-nigh impossible for the most careful solicitor or managing clerk to say what ought to be copied and what ought not. It may then be the duty of the Taxing Master to make a rough guess at what ought to be allowed in respect of any particular

part of the correspondence. It might very often be easy (in the sense of not being difficult, for the operation must always involve labour) to reduce 100 folios considerably—it may be to twenty-five. In a case of that kind the Taxing Master would probably only allow one-half or one-third or one-fourth, according to circumstances. If therefore I was satisfied here, upon the statement of the Taxing Master, that he had considered this correspondence in that point of view, I should be loth to interfere with his discretion; as at present advised, I should not do so; but I cannot come to that conclusion from the answers he has made to the Plaintiff's objections. We all know Mr. *Ryland* to be a solicitor of very great experience, and a Taxing Master of the highest capabilities and very industrious, and if he said that he had looked into it from the point of view I have mentioned no one could doubt that he had done so. But he does not say that—at least, I do not read his answers as saying it. He says that the fact of the correspondence being entered in the judgment as read does not affect his discretion—and I pause to say that I entirely agree with him. The Taxing Master must look at it independently of that, which only shews that it was before the Court. He says that he has "examined and considered it carefully on more than one occasion, the Defendants so strongly objecting to its propriety"—that is to say, to the whole. I understand that the Defendants did object to any part of it being read. He says he gave the matter all the attention of which he was capable, and exercised his discretion upon it to the best of his ability. Of that I have not the slightest doubt. But when he comes to allow one-third he says that he allows that particular amount as the equivalent of 1159 folios "which in my judgment and discretion comprises all that is necessary and proper to allow." He may mean that one-third of the copy of correspondence comprised all the correspondence that it was necessary and proper to bring before the Court, and to supply to counsel and the Court, and that therefore one-third of the whole is all that ought to be allowed in respect of the copy of correspondence. He may mean that; but that is not what he says. He says that the one-third comprises "all that is necessary and proper to allow." It may be a mere misuse

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of language. It may be that I do not quite understand what he means. He does not state that which I must ask him to state, namely, what part of the correspondence, having regard to all the circumstances of the case, and to the way in which the case was brought before the Court and treated by counsel and the Court was in his judgment necessary and proper to be supplied to counsel and the Court for the proper argument and decision of the case. If he adheres to the one-third, I, as at present advised, cannot interfere with him. But I think he ought to allow all that was necessary and proper in that point of view. Although he may in fact have done it, I do not think he has said so, and I must ask him to reconsider the matter from my point of view, or to state that he has already done so; and I must send the case back to him with an intimation to that effect.

The Taxing Master reported to his Lordship as follows:—

"Upon the taxation and again on the objections I carefully considered the correspondence, and was on both occasions of opinion that 1159 was the proper length to allow. As directed by my Lord I have reconsidered the matter, and have had the advantage of reading very carefully the shorthand writer's notes of my Lord's judgment of the 27th of October, 1894. I have also again read and reconsidered the pleadings, and have perused the whole of the 3477 folios of correspondence. Having regard to all the circumstances of the case, and to the way in which the case was brought before the Court and treated by counsel and the Court, 1142 folios of the correspondence and no more was in my judgment necessary and proper to be supplied to counsel and the Court for the proper argument and decision of the case."

Nov. 15. Upon this report his Lordship adopted the conclusion at which the Taxing Master had arrived, and dismissed the first summons, but made no order as to costs.

Butcher, for the Defendants, *Sarah Ann Meakin*, *Albert Buchanan*, and *William Harvie*, in support of the second summons:—

The whole of these statute-barred items ought to be disallowed. As regards those which have not been paid by the trustees to

their solicitors, it is clear that the solicitors could not have recovered them by action, and it was never intended by the judgment of the 24th of July, 1893, to give either to the retiring trustees or their solicitors any right which they did not previously possess. If the solicitors had brought an action for the costs against the trustees it must necessarily have failed if the trustees set up the *Statute of Limitations*. In an administration action a residuary legatee after judgment has a right to compel executors to plead the statute: *In re Wenham* (1), (following and extending many previous cases), and that rule must apply by analogy as between the beneficiaries and the trustees in the present case.

But further, even as regards the sums which have been actually paid by the trustees to their solicitors, as the trustees did not claim them within six years as against the trust estate, they cannot claim them now. The trustees might have been entitled to reimburse themselves out of the trust funds in their hands; but as they have not done so their remedy is gone, and the order to tax cannot confer a new remedy upon them. *Curwen* v. *Milburn* (2), referred to by the Taxing Master, so far as it is an authority, tends to shew that under the common order to tax the Taxing Master cannot properly take notice of statute-barred items. On principle he ought not, and there is no authority to shew that he ought. *Curwen* v. *Milburn* was a peculiar case, and the actual decision in it throws no light on the present question.

Ingle Joyce, for the Plaintiff and the Defendant *W. H. Budgett* (the former trustees of the settlement):—

The trustees have a lien or right of indemnity as against the trust estate for the whole of their costs, charges, and expenses, properly incurred, and by the terms of the judgment they are entitled to retain the whole out of the capital moneys subject to the trusts of the settlement. The whole object of the direction for taxation is to give effect to the trustees' lien, and in this respect the case is similar to *Curwen* v. *Milburn*. The statute does not destroy the debt, but only prevents an action being

(1) [1892] 3 Ch. 59. (2) 42 Ch. D. 424.

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brought. In the present case no action is brought. If the trustee of a settlement holds stock, and has incurred costs, he is not bound to sell the stock at once in order to pay the costs. He is in fact trustee for himself of so much of the stock as is equivalent to the amount which he has properly expended. He cannot be bound to plead the statute against himself. A trustee, like an executor, may retain his own debt though statute-barred.

Under the common order to tax it may be right that statute-barred items should be disregarded, as the solicitor is *primâ facie* in the position of a plaintiff. But that practice has no application to a taxation of this kind, where the trustees are in the position of defendants claiming a right of retainer.

The analogy of the rule which applies in administration actions after judgment as between the executors and creditors of the testator whose debts are statute-barred is wholly inapplicable to a case where the debt is that of the trustee, which he has properly incurred on behalf of the trust estate. There is, therefore, no distinction in principle between those statute-barred items which have, and those which have not, been actually paid by the trustees. It would be very undesirable that solicitors to trustees should be mulcted of their costs merely because, for the convenience of their clients in the administration of the trust, they had refrained from requiring payment for a period of more than six years.

[He referred also to *In re Murray* (1); *In re Carter* (2).]

[KEKEWICH, J., said that in the present case there appeared to be a practical difficulty, inasmuch as the statute-barred items having been separately certified, and their admissibility left for the decision of the Court, they were necessarily not vouched, and therefore the Court would have no means of assuring itself that the money reached the hands of the solicitors. This could not ordinarily arise on a taxation of costs, charges, and expenses properly incurred, because, as his Lordship believed, the Taxing Master in an ordinary case did not issue his certificate until all the items were vouched. Some doubt was then intimated by counsel as to whether this was the practice; and his Lordship

(1) W. N. (1867) 190. (2) 55 L. J. (Ch.) 230.

accordingly sent for the Taxing Master and conferred with him on the subject. His Lordship then said that his notion of the practice was confirmed by the Taxing Master. In taxing costs, charges, and expenses of trustees any items for costs not paid to the solicitors of the trustees were queried in pencil or otherwise, and the certificate did not issue until the vouchers were produced and the queries erased.]

Butcher, in reply:—

It would be a great hardship on *cestuis que trust* if, in cases such as this, statute-barred items were allowed after the lapse of many years, when there might be great difficulty in obtaining evidence to shew whether the costs had or had not been paid; and it would be very burdensome if under every common order to tax trustees' costs the history of each item had to be inquired into. On the other hand, the solicitors of trustees can easily protect themselves against the operation of the statute by taking an acknowledgment. Here the costs begin in 1866. The only remedy of the trustees is by action for indemnity, and to such an action the statute might be pleaded in bar.

KEKEWICH, J.:—

In this, as in all other cases, it is of the utmost importance to ascertain exactly what the Court is required to decide, and that is sometimes more easily approached from the negative side; that is to say, by ascertaining what the Court is not required to decide, and that course seems to be convenient here.

Reference has been made to authorities, and through the authorities to the practice of the Court, concerning common orders to tax solicitors' bills of costs, and the arguments and remarks which apply to the common order may with equal propriety be applied to a special order, that is to say, an order made under special circumstances, but not dealing with the particular question of statute-barred items. The question whether statute-barred items ought to be considered by the Taxing Master or not came before Mr. Justice *North* in *Curwen* v. *Milburn* (1), and he expressed a doubt whether under the common order to tax a

(1) 42 Ch. D. 424.

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solicitor's bill the Taxing Master ought to strike out, without taxing them, all statute-barred items. I believe it has always been the practice at the Taxing Masters' Office, in the absence of special directions, to strike out statute-barred items. That appears to be so from what was done in *Curwen* v. *Milburn* (1). It also appears from the case of *In re Murray* (2), which was twenty-two years earlier. In both of those cases—*In re Murray* and *Curwen* v. *Milburn*—it was decided ultimately, quite apart from any question of this kind, that a solicitor's lien was not affected by the accident that some of the costs for which he claimed the lien were statute-barred, and therefore were not dealt with on the taxation. Those decisions go no further than that. They may be said to leave the question still open whether the Taxing Master ought to include in the taxation statute-barred items. But if I am right, as I believe I am, in saying that it has never been the practice at the Taxing Masters' Office to tax such items, they will, as hitherto, remain untaxable under the common order, and also under a special order not dealing with them particularly. *Curwen* v. *Milburn*, however, is useful as indicating the convenient course to be followed where an objection is taken before the Taxing Master respecting statute-barred items on a bill submitted for taxation, and the question has to be determined whether in that case, not being a common case, the statute-barred items ought to be allowed. The Taxing Master here has followed a convenient course in saying what ought to be allowed, if anything, leaving it open to the Court to determine whether it shall be allowed or not. I do not see how he could have adopted a more convenient course. He has done that, and has remitted the question to the Court, as he could not dispose of it himself. I am not dealing with the common order or special order to tax a solicitor's bill. What I am dealing with is a direction to ascertain by the process of taxation the charges and expenses properly incurred by trustees. Mr. *Joyce* has called my attention to the form of order, that the trustees do pay and retain such last-mentioned costs when taxed out of the capital moneys subject to the trusts of the settlement. This must not be forgotten; but I am not sure that it really does govern the

(1) 42 Ch. D. 424. (2) W. N. (1867) 190.

question in any way, because there might just as well be, as we often have it, liberty to apply in Chambers to raise the costs, or a direction at once to raise and pay them by mortgage or sale. But the importance of it is not in its exact form, but because it shews that the costs, charges, and expenses were to be paid somehow or other out of the trust estate; that is, that the trustees were to be indemnified by the trust estate against the costs, charges, and expenses. Why should they not be indemnified against costs which they have properly incurred to their solicitors (for that they have been properly incurred is concluded by the taxation), but which they might have refused to pay on the ground that they were statute-barred?

The costs divide themselves into two classes. First come the costs which the trustees have paid, though they were not bound to pay them—that is to say, they might have pleaded the statute. It has often been said that the statute is dishonestly pleaded. Trustees are not bound to do anything dishonest or immoral for the sake of their *cestuis que trust*; and therefore, if they have paid these costs, it seems to me that they are entitled to be indemnified against them out of the trust estate. The analogy is cited—and it becomes important as regards the second division—of the case of an executor. Like most other analogies, it is far from complete; but to the extent to which it can properly be applied it assists the trustees very largely. An executor may pay a statute-barred debt; he is perfectly at liberty to do so, and, unless dishonesty or fraud be set up, his act cannot be impeached. Being at liberty to pay a statute-barred debt, he is at liberty to retain a statute-barred debt. There is no occasion to go fully into the law on the subject, but I have found one case—a recent one—which was not cited in argument, and which is well worth a reference, because of its comment on earlier cases. That is the case of *Midgley* v. *Midgley* (1), before the Court of Appeal, on appeal from Mr. Justice *Romer*. Lord Justice *Lindley*, in giving judgment in that case, refers to a case of *Hill* v. *Walker* (2). In that case I find the Vice-Chancellor *Wood* (3) said that "the Court had decided in previous cases, that an executor is not bound to

(1) [1893] 3 Ch. 282. (2) 4 K. & J. 166.
(3) 4 K. & J. 168.

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set up the *Statute of Limitations* as a defence to claims made by third persons against the testator's estate; and if he is not bound to take that course in dealing with others, what principle can there be for saying he is to be more rigorous in regard to himself?" I thought it worth while to look at a recent text-book—a useful book by Mr. *Elgood* (1)—to see whether reference was made to any other cases, and I find the law stated in a concise and neat way thus: "Inasmuch as an executor may pay a debt of his testator's which is barred by the *Statutes of Limitations*, he may retain for his own statute-barred debt; and *e converso*, as he would be committing a *devastavit* if he were to pay a debt barred by the *Statute of Frauds*, he cannot retain for such a debt due to himself." The advantage of that on the present occasion is that it shews a reason, namely, that an executor is not committing a *devastavit* in retaining a statute-barred debt. It may be perfectly right to do it. A trustee is in a much better position than an executor for many reasons, and for one which I will come to presently. When it is said that the trustees are to be indemnified against costs which they have properly paid, and when the conclusion is once arrived at that statute-barred claims, including certainly those to solicitors as much as to any tradesman, may properly be paid, the question seems to me to be determined. They are to retain and pay what they have properly paid.

But that does not quite establish their claim to pay their solicitors costs which ought to have been paid—costs properly incurred, for which the trustees were once liable at law, but which have become statute-barred, and which have not been paid by them, but which, nevertheless, they assert ought to be paid, and assert honestly, no one impeaching their honesty in that respect. That raises another question.

It occurred to me to inquire how a claim of that kind could pass a Taxing Master; because certainly the practice is—I had no doubt about it, but I have verified it by the information of Mr. *Ryland*—that a Taxing Master in such a case does not allow the certificate to go for costs, charges, or expenses paid unless they have been paid—that is to say, unless a voucher is produced

(1) *Walker* and *Elgood* on Executors, 2nd Ed. p. 188.

after payment. That was impossible in the present instance because he adopted the course, which, as I have already stated, I think a convenient one, of taxing them separately in order to remit to the Court the question whether they were to be paid or not. Therefore he could not call for a voucher when the point was left open whether there ever was to be a voucher. But that does not create any practical difficulty. That is a question which cannot often arise before a Taxing Master for the reason I have mentioned. But are not the trustees entitled honestly to say that these costs ought to be paid, and, therefore, they ought to be allowed to retain and pay them out of the trust estate?

Mr. *Butcher's* strong point on that is that when once the *cestuis que trust* intervene they are entitled to exercise their own judgment. If the trustees had paid the costs it might be that there was nothing to be said; but if the trustees have not paid them, "I," says Mr. *Butcher*, "representing the *cestuis que trust*, step in and say I will insist on the statute, although the trustees do not," and there he relies on the analogy of the administration of a deceased person's estate, and refers to the most recent example of it in *In re Wenham* (1), before Mr. Justice *North*, where the old practice was applied to an administration summons. The law is perfectly clear: the residuary legatee may after judgment step in and say, "Now I am in command, and you, the executor, shall not do what you might have done if there had been no judgment, that is to say, I will insist on the statute being set up." Now, what is the distinction? The distinction seems to me to be very clearly shewn by the cases to which I have referred for this purpose. The executor is not paying his own debt. He is paying the testator's debt. He is admitting a creditor to prove against another's estate. The trustee is paying his own debt, and he, although the legal liability may be gone, still owes the money. It may not be recoverable, but still the debt is not gone. It is a debt due from him. Any question of dishonesty, any setting up the statute being out of the way, he still remains morally liable, and he remains liable in every sense except that an action cannot be brought. Ought he not to be indemnified against that? What is the meaning of indemnity?

(1) [1892] 3 Ch. 59.

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Not surely that he is only to be indemnified against that which can be enforced by action, but that he is to be indemnified against all fair claims of every kind. The distinction seems to me to get rid of what otherwise struck me as a powerful argument. The trustees are not admitting claims against another's estate, although indirectly it is so. It is not a claim against the estate, or at all events not that only; it is a claim against the trustees themselves, and I think they are entitled to be indemnified against that. Therefore I think that all these sums which the Taxing Master certifies as having been properly incurred by the trustees, paid or payable to the solicitors, notwithstanding the statute, ought now to be included in the costs which are to be retained and paid out of the capital moneys subject to the trusts of the indenture of settlement. There will be no order on the summons except that the retiring trustees add their costs of the application to the costs, charges, and expenses which they are directed to pay and retain.

Solicitors: *Ingle, Holmes, & Sons; Foss & Ledsam.*

C. C. M. D.

KIBBLE *v.* FAIRTHORNE.

ROMER, J.

1894

Nov. 7, 8, 9.

[1893 K. 977.]

Limitations—Statutes of—Mortgagee—Extinguishment of Title of Second Mortgagee—Possession of Mortgagor—Vesting of Legal Estate—Statute of Limitations, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 34—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

Sect. 34 of 3 & 4 Will. 4, c. 27, which provides that at the determination of the statutory period of limitation for bringing an action "the right and title" to the land shall be extinguished, applies as between a mortgagee and a mortgagor in possession, and in favour of the latter, although a prior mortgage has been in existence during the earlier part of such statutory period.

The effect of barring the mortgagee's title is to vest the legal estate in the mortgagor, and therefore, if he afterwards grants a mortgage to another person, and the subsequent mortgagee brings an action, against the mortgagor and the mortgagee against whom the statute has run, to enforce his security, the plaintiff may rely on such extinguishment of title in support of his own claim as first mortgagee, although the mortgagor does not rely on the statute and has, after the expiration of the statutory period, given his co-defendant a written acknowledgment.

In 1862 hereditaments in the parish of *St. James, Brackley*, in the county of *Northampton*, were conveyed to *E. F. Fairthorne* in fee simple, and he remained in possession of them from the date of the conveyance until the trial of the action mentioned below.

By a deed dated the 4th of November, 1864, *E. F. Fairthorne*, in consideration of an advance of £1000, conveyed the property to *T. Hyde* and others, who were the trustees of a building society, by way of mortgage to secure to the society or its trustees, according to the rules, payment in fourteen years of 168 monthly instalments of £9 12*s.* 4*d.* each. This deed provided that, on payment of all the moneys thereby secured, the trustees should indorse on the deed the usual statutory receipt and acknowledgment.

By a deed dated the 3rd of September, 1874, *E. F. Fairthorne*, in consideration of £700, therein stated to be lent to him by *Thomas Pain*, conveyed the same hereditaments to *Pain*, subject to the mortgage to the building society, by way of mortgage to secure £700 and interest. This deed contained a covenant by

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E. F. Fairthorne to repay the principal and interest on the 3rd of March, 1875, and there was a proviso for redemption on payment on that day.

In 1877, *E. F. Fairthorne* deposited with a bank at *Banbury* such of the title deeds of the property as were in his possession as security for an overdraft. No notice of this charge or of the mortgage of 1874 was given to the building society. *Pain* became bankrupt, and on the 19th of May, 1881, the trustee in his bankruptcy delivered the mortgage deed of the 3rd of September, 1874, to *E. F. Fairthorne.*

In 1886 all the moneys owing to the building society had been paid off, and on the 18th of May, 1886, the trustees of the society indorsed on their mortgage deed the usual statutory receipt for the moneys thereby secured, and delivered it so indorsed to *E. F. Fairthorne.*

In 1890 the bank required *E. F. Fairthorne* to give further security for his overdraft, which then amounted to £1200, or to repay the amount; and on the 12th of July, 1890, *Thomas Kibble,* at the request of *E. F. Fairthorne,* paid the bank the £1200 and received from them the title deeds in their possession. On the same day *E. F. Fairthorne* gave *Kibble* a memorandum that the deeds were deposited to secure the £1200 and interest.

By a deed dated the 12th of May, 1892, *E. F. Fairthorne,* as beneficial owner, conveyed the hereditaments to *Kibble* by way of mortgage to secure the £1200 and interest thereon. This deed was in the form of a first mortgage.

In August, 1893, *Kibble* issued an originating summons against *E. F. Fairthorne* to enforce his mortgage; but in answer to this summons one *E. Fairthorne* filed an affidavit in which he claimed that he, *Caroline Fairthorne,* and *Frederick Fairthorne* held a mortgage on the hereditaments for £700 and interest in priority to *Kibble's* mortgage.

On discovering that questions of priority would arise, *Kibble* discontinued the proceedings on the originating summons, and in November, 1893, he commenced this action against *E. F. Fairthorne, Caroline Fairthorne, E. Fairthorne,* and *F. Fairthorne,* claiming a declaration that he was entitled to a first charge to secure £1200 and interest, in priority to any mortgage or charge

belonging to *Caroline Fairthorne*, *E. Fairthorne*, and *F. Fairthorne*; a declaration that the legal estate was vested in him, or in the alternative that the Defendants might be ordered to convey it to him; recovery of all title deeds in the possession of the Defendants; accounts; that the Plaintiff's mortgage might be enforced by foreclosure or sale; the appointment of a receiver; and possession of the mortgaged hereditaments. The Defendants, *Caroline Fairthorne*, *E. Fairthorne*, and *F. Fairthorne*, by their defence, alleged that the £700 secured by the mortgage of the 3rd of September, 1874, formed part of the residuary personal estate of *Eliza Pain*, who died in 1869, having bequeathed her personal estate to these Defendants; that *Thomas Pain* died about the 12th of June, 1890; and that *J. W. Symington*, his executor, by a deed dated the 3rd of June, 1893, conveyed the mortgaged hereditaments to these Defendants and their heirs, to the use of them, their heirs and assigns for ever, "and to no other use, interest, or purpose whatsoever."

This deed contained recitals of the mortgage of 1874; that "default was made in payment of the said sum of £700 and interest on the day in the said proviso for redemption appointed for that purpose, and the same with an arrear of interest amounting to £590 12*s.* 6*d.* still remains due and owing upon the aforesaid security," and that *Caroline Fairthorne*, *E. Fairthorne*, and *F. Fairthorne* had requested *Symington* to convey to them the legal estate in the mortgaged hereditaments, which he had agreed to do.

The sum of £590 12*s.* 6*d.* represented the whole amount of interest (less tax) from the date of the mortgage of 1874.

The Plaintiff in his pleadings alleged that from the date of the mortgage of the 3rd of September, 1874, to the date of the pleading, no principal or interest had ever been paid to or demanded by the alleged mortgagees by or from *E. F. Fairthorne*, that no acknowledgment of their title had been given by him, and that the alleged mortgage had become void and could not be enforced by these Defendants.

The Defendants alleged that *E. F. Fairthorne* had acknowledged in writing the title of the other Defendants after *Symington's* conveyance to them.

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The action was tried before Mr. Justice *Romer* on the 7th, 8th, and 9th of November, 1894. Several questions were argued, but ultimately the Defendants agreed to accept the judgment of the Court on the question the argument of which is reported below.

Oswald, Q.C., and *John Henderson*, for the Plaintiff:—

The Defendants, *C. Fairthorne*, *E. Fairthorne*, and *F. Fairthorne*, have no better title than *Pain* or those claiming under him would have had immediately prior to the execution of the assignment from *Symington*. But at the date of that assignment all claims under the mortgage to *Pain*, whether in respect of the money secured or the land mortgaged, had been absolutely extinguished, and the mortgagee's title to the land no longer existed: *Dawkins* v. *Lord Penrhyn* (1).

The claim in respect of money secured on mortgage of land is barred, after twelve years from the time when the right to payment accrued, or from the time when some payment of principal or interest was made, or an acknowledgment in writing was given: 37 & 38 Vict. c. 57, s. 8.

That section must be read together with sect. 34 of 3 & 4 Will. 4, c. 27, which provides that, at the determination of the statutory period limited to any person for making entry or bringing an action, "the right and title of such person to the land . . . shall be extinguished."

And when once a title has been extinguished by the *Statute of Limitations*, no mere acknowledgment by the person who has acquired the statutory title can restore the old title: *In re Alison* (2); *Sanders* v. *Sanders* (3).

The effect of barring the mortgagee's title is to vest the legal estate in the mortgagor: *Sands to Thompson* (4).

Therefore in 1887, that is twelve years from the time when the principal became payable under *Pain's* mortgage, the title of the mortgagee was absolutely extinguished and re-vested in the mortgagor.

E. Manley Smith, for *E. F. Fairthorne*.

(1) 4 App. Cas. 51.
(2) 11 Ch. D. 284.
(3) 19 Ch. D. 373, 379.
(4) 22 Ch. D. 614.

Neville, Q.C., and *S. Dickinson*, for the Defendants, *C. Fairthorne*, *E. Fairthorne*, and *F. Fairthorne*:—

The decisions relied on by the Plaintiff do not apply to this case. It is well-settled law that where a statutory title has been conferred by twenty (now twelve) years' possession, a subsequent acknowledgment will not re-vest the property. But the cases establishing that proposition were decided on sections which have no application to the present case, which is governed by the sections specially relating to mortgagors and mortgagees.

[ROMER, J.:—Suppose a mortgagor is in possession for twelve years, and pays no principal or interest and gives no acknowledgment, is he not absolutely entitled, and what becomes of the legal estate?]

It is outstanding in the mortgagee. Sects. 40 and 42 of 3 & 4 Will. 4, c. 27, and sect. 8 of the Act of 1874, apply to mortgages and only bar the remedy to recover the money secured. The effect of sects. 2, 3, and 28 of the Act of *William* on the mortgagee's right of entry was doubtful.

[ROMER, J., referred to 7 Will. 4 and 1 Vict. c. 28, and *Shelford's* Real Property Statutes (1).]

Where only the remedy was barred, and the right was not extinguished, the remedy might be revived by a subsequent acknowledgment.

[ROMER, J.:—But the remedy as against the land, even in the case of mortgagor and mortgagee, is governed by the earlier sections. *Harlock* v. *Ashberry* (2) shews that an action of foreclosure, which would have been the mortgagee's remedy, is an action for recovery of land, and therefore not within sect. 40, but within sects. 2 and 24 of 3 & 4 Will. 4, c. 27, and 7 Will. 4 and 1 Vict. c. 28; and *Sutton* v. *Sutton* (3) shews that under sect. 8 of the Act of 1874, after twelve years have elapsed both the personal remedy on the mortgagor's covenant and the remedy against the land are gone.]

7 Will. 4 and 1 Vict. c. 28 shews that time does not run from the date when entry might first have been made.

(1) 9th Ed. p. 159. (2) 19 Ch. D. 539. (3) 22 Ch. D. 511.

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The rights of the mortgagee under the mortgage of 1874 only accrued in 1886, when the building society mortgage was paid off, and, as twelve years have not elapsed since 1886, the persons claiming under the mortgage of 1874 may still recover the land. The mortgagor was not holding possession against those claiming under the mortgage of 1874, and it is not a question of the right to enter. If the first mortgagee had been in possession during the whole of the twelve years from the time when the second mortgagee's money became payable, it would have been hard on the latter if his title became extinguished although he never had the power to enter.

[ROMER, J. :—There is no hardship, for he could foreclose the mortgagor before the twelve years expired.]

The Plaintiff cannot set up the *Statutes of Limitations*, for there is nothing in the statutes conferring any right or title except on the person in possession. This possessory title cannot be interfered with, but there is no divesting clause in favour of any person who has acquired a title otherwise than by possession.

ROMER, J. :—

I cannot say that I feel any doubt as to how I should decide this question.

A mortgagee has two remedies: one being against the land comprised in his mortgage, and the other against the mortgagor, personally, to recover the moneys secured; and as regards these two classes of remedies there are in the *Statutes of Limitations* two distinct sets of provisions. Take the Act 3 & 4 Will. 4, c. 27, and it will be found that there are two sets of enactments, one dealing with rights against the land, and the other with personal remedies.

These two sets of enactments stand on an entirely different footing. As to the land, it is provided that when the statutory limitation operates, not only is the remedy against the land barred, but the mortgagee's interest in it is extinguished. In the second set of provisions—those relating to personal remedies —the statutory limitation has a different effect. There only the remedy is barred, the debt itself not being extinguished.

In this case it is admitted and established that those claiming under the mortgage to *Pain* never, during any part of the statutory period, received any principal or interest, and that no acknowledgment was given by the mortgagor. That being so, not only was the mortgagee's remedy against the land barred, but the charge itself was extinguished. Those claiming under the mortgage of 1874 have, therefore, no right to the land, and cannot set up the mortgage, or any title under it, in priority to the Plaintiff.

It has been suggested that the statutory period did not so operate because there was a prior outstanding legal mortgage which was in existence until 1886. But the mortgagees under that mortgage were never in possession of the land. The mortgagor was, throughout the statutory period, in possession of the mortgaged property, and throughout this period the equitable mortgagee could have taken proceedings to enforce his right to the land. For instance, he could have brought a foreclosure action. That is an action for recovery of land, and is within the earlier provisions of the statute 3 & 4 Will. 4, c. 27. Therefore, as between the mortgagor and those claiming under the mortgage of 1874, the statutory period commenced to run from the day fixed by that deed for the redemption of the property, and on the expiration of twelve years from that date the mortgagee under that deed, who up to the end of that time could have taken proceedings, was barred, not only as to his remedy, but as to his right to the land, and his charge was gone.

There must be a declaration that under his mortgage the legal estate is vested in the Plaintiff, and he is entitled to the relief which he claims.

Solicitor for Plaintiff: *T. A. Jones*, agent for *Stockton & Sons, Banbury.*

Solicitors for Defendants: *Hickin, Smith, & Capel-Cure*, agents for *E. F. Fairthorne, Brackley.*

F. E.

VAUGHAN WILLIAMS, J.

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Nov. 21, 22.

In re ISSUE COMPANY.

HUTCHINSON'S CASE.

[00354 of 1893.]

Company—Member—Agreement to become—Director—Qualification—Winding-up—Contributory—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 23.

Where the articles of association of a company require that the directors shall hold a certain qualification in shares, merely accepting office as a director and acting as such do not constitute an agreement to become a member of the company within sect. 23 of the *Companies Act*, 1862, but only a contract to qualify by taking the required shares within the time specified by the articles, or, if no time is named, within a reasonable time.

The lapse of the time within which the director is bound to qualify only amounts to an offer to take shares, and no agreement to take them exists until the offer has been accepted, *e.g.*, by placing the director on the register of shareholders, by resolving to allot the shares to him, or by his so acting as to shew that he has assumed that his offer has been accepted, and by both parties acting on that assumption. Mere lapse of time will not turn the offer into a contract; and there is no contract unless the offer is accepted before the company goes into liquidation.

THE *Issue Company, Limited*, was registered on the 16th of March, 1893, under the *Companies Acts*, 1862 to 1890, with a capital of £125,000 in preference and ordinary shares of £5 each.

Alfred Betzold and *J. K. K. Benjamin* each signed the memorandum of association for one share.

The articles of association provided as follows:—

"88. The first directors shall be appointed by the signatories of the memorandum and articles of association, or a majority of them."

"90. The qualification of every director shall be the holding in his own name of shares or stock to the nominal value of £500 at the least."

"93. The office of a director shall be vacated . . . if he cease to hold the required amount of shares or stock to qualify him for office."

Betzold, *Benjamin*, *R. H. P. Hutchinson*, and another person were appointed the first directors, and accepted office.

Betzold and *Benjamin* both acted as directors, and remained in office till the company was ordered to be wound up.

The minute-book gave *Hutchinson's* name as if he had been present at a meeting of directors held on the 24th of April, 1893, and he signed the minute-book; but on the hearing of the summons mentioned below it was alleged that he was not present at the meeting. On the 16th of July, 1893, he, by letter, resigned office, and his resignation was accepted at a meeting of directors held on the 5th of October, 1893.

Neither *Betzold*, nor *Benjamin*, nor *Hutchinson* applied for his qualification shares, and no allotment or notice of allotment of any shares was made or given to any of them.

The company was an abortive one. The agreement with the vendor could not be carried out, and, although he was to have received paid-up shares as the consideration for his business, no shares were allotted to him, or (with the exception of the seven shares of the subscribers to the memorandum) to any one else. The company never issued a prospectus or asked the public to take shares; it had no register of shareholders; it never did any business; and in December, 1893, it was ordered to be wound up.

The liquidator placed the names of *Betzold*, *Benjamin*, and *Hutchinson* on the list of contributories in respect of 100 shares each—their qualification shares—and they applied to have their names removed from the list in respect of all the shares except the two in respect of which *Benjamin* and *Betzold* had signed the memorandum of association.

Channell, Q.C., and *Clarendon Hyde*, for *Hutchinson*:—

Merely accepting the office of director, without acting, is not agreeing to take shares so as to make a man liable as a member within sect. 23 of the *Companies Act*, 1862: *Hewitt's Case* and *Brett's Case* (1); *In re Wheal Buller Consols* (2).

Bramwell Davis, for the liquidator:—

The articles amount to an implied authority to the company to place on the register of shareholders the names of those who

(1) 25 Ch. D. 283. (2) 38 Ch. D. 42.

VAUGHAN WILLIAMS, J.

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HUTCHINSON'S CASE.

have accepted the office of a director. This authority does not come to an end at the commencement of the liquidation, but is a continuing authority to the liquidator to place the name on the list of contributories: *In re Bread Supply Association* (1); *Isaacs' Case* (2).

[VAUGHAN WILLIAMS, J., referred to *Ex parte Cammell* (3).]

That case decided that in a case like this there is an implied authority to put a director's name on the register, but that in the case then before the Court the authority no longer continued. In *Isaacs' Case*, Mr. Justice *Stirling* treated the question now before the Court as being still open.

Channell, in reply.

G. F. Hart (*Farwell*, Q.C., with him), for *Betzold*:—

A list of contributories is a very different thing from a share register. There has been no allotment, and there never was a register. The cases which most resemble this case in their facts are *Hewitt's Case* and *Brett's Case* (4), and the decision there is in my favour.

Having regard to those decisions, it cannot be said that a reasonable time for qualifying has elapsed in the present case, even if there was a contract to take the qualification shares, and the question whether such conduct as that of *Betzold* amounts to an agreement within sect. 23 was left undecided; but it was held in *In re Wheal Buller Consols* (5) that it did not.

Isaacs' Case was decided on a particular, and then little known, form of article which is quite different from any provision in the articles of association of this company.

The facts of *In re Bread Supply Association* were different from those of the present case.

Macnaghten, for *Benjamin*:—

Benjamin is in the same position as *Betzold*. *In re Bread Supply Association* is the only authority, if it is an authority, for

(1) W. N. (1893) 14.
(2) [1892] 2 Ch. 158.
(3) [1894] 2 Ch. 392.
(4) 25 Ch. D. 283.
(5) 38 Ch. D. 42.

placing a director on the list of contributories in such a case, and it is inconsistent with *In re Wheal Buller Consols* (1).

Bramwell Davis, in reply:—

The question has been left open by all the cases except in so far as it is decided in *In re Bread Supply Association* (2).

[He also referred to *Miller's Case* (3); *Ex parte Lord Inchiquin* (4).]

VAUGHAN WILLIAMS, J.:—

The cases of the three gentlemen who are applying to have their names removed from the list of contributories differ very little in their facts, and I will deal with them all on general principles.

The names of the Applicants should not be on the list unless they have agreed to become members of the company, and in my judgment it cannot be made out that any one of them has entered into such an agreement.

The question what constitutes an agreement to become a member within sect. 23 of the *Companies Act*, 1862, has been frequently discussed, and there are many reported cases on it, but I do not intend to discuss them one by one. Each one depends, and necessarily so, upon its own facts, and as the facts have not always been the same, the Courts in some cases have found that there was an agreement, and in others that there was not.

The question I have to decide is whether the Applicants in this case agreed to become members of the company. Admittedly, there was no express agreement to take shares, or application for, or allotment of, the shares. If there was any agreement, it was an implied one; and what agreement can be implied from the facts? Mere acceptance of the office of director is not sufficient to constitute an agreement to become a member. The articles of association provide and require that the directors shall hold a certain qualification in shares; but I do not understand Mr. *Bramwell Davis* to contend that the mere fact of accepting the office of director of a company registered with

(1) 38 Ch. D. 42.
(2) W. N. (1893) 14.
(3) 3 Ch. D. 661.
(4) [1891] 3 Ch. 28.

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articles containing such a provision is sufficient to enable the Court to infer that there is an agreement of membership. There is the additional fact that the Applicants—I think all of them—more or less acted as directors; but Mr. *Bramwell Davis's* argument scarcely goes the length of saying that all these facts taken together are sufficient to constitute a contract of membership.

The proper contract—and, I think, the only contract which can be inferred from the facts which I have stated—is a contract to qualify as a director; that is to say, to take the required number of shares, within a reasonable time, either from the company or from outside persons. But that is not a contract of membership. It is contended that after a reasonable time has elapsed a contract of membership exists; but I do not agree with that. There is no contract at that moment to take shares, but, at the outside, only an offer to take shares.

Something else is required before a contract comes into existence. The offer may be accepted by placing the name of the director on the register of shareholders, or by passing a resolution for the allotment of the shares to him. And if, after the lapse of a reasonable time, the person who has made such an offer so acts as a director as to shew that he assumes his offer has been accepted, and both he and the company act on that assumption, a complete contract may exist.

But mere lapse of time will not make a complete contract. I agree that in *Hewitt's Case* and *Brett's Case* (1) the point was left open. *Cotton*, L.J., in delivering the judgment, said (2): "There is a difference of opinion between the members of the Court on the question whether the contract entered into by these directors to obtain a qualification does amount to an agreement to take shares within the meaning of the 23rd section, and in the view of this case in which we all agree it is not necessary to decide, and we think it better not to express any opinion on, this point."

I am deciding here that a contract to qualify is not an agreement to take shares within s. 23 of the Act of 1862. I agree that it was not necessary to decide the point in *Hewitt's Case* and *Brett's Case*, and I am not deciding it now on the authority of that decision.

(1) 25 Ch. D. 283. (2) 25 Ch. D. 296.

I am not, however, deciding it on my own personal reasoning, but on the authority of two subsequent cases, to which I will presently refer, which shew that the Court has acted upon the assumption that an agreement to qualify, arising from the acceptance of the office of director and acting as director of a company which has an article providing for a qualification in shares, does not amount to an agreement to take shares within s. 23.

The two cases I am referring to are *In re Wheal Buller Consols* (1) and *Ex parte Cammell* (2). I will deal with *Ex parte Cammell* first, and examine the facts to see whether the question before me was involved in the decision in that case. The articles provided that the qualification of a director should be the holding of 200*l.* share capital, that the first directors should be allowed one month from the first general allotment of shares in which to acquire their qualification, and that the office of director, in the case of a first director, should be vacated if he failed to obtain the requisite shares within the prescribed period, or if he sent in a written resignation. I pause here to observe that it is much easier to imply a contract where a finite time like one month is allowed for taking the shares than where a director has an indefinite time—a reasonable time—within which to qualify. Lord Justice *Lindley* states the further facts of the case as follows (3): "*Cammell* was named as an original director in a prospectus issued shortly after the company was formed, and he attended one or two meetings during the first month of the company's existence. On the 29th of March, 1893, at a meeting at which he was not present, forty shares were allotted to him and the other directors as their necessary qualification. On the 7th of April another meeting was held at which the minutes of the previous meeting were read. *Cammell* was not present at that meeting, but he was present at a meeting held on the 14th of April, when the minutes of the meeting of the 7th of April were read. There was some controversy whether he knew of the allotment. Mr. Justice *Stirling* came to the conclusion that he did not, and I accept that conclusion. On the 29th of

(1) 38 Ch. D. 42. (2) [1894] 2 Ch. 392.
(3) [1894] 2 Ch. 397.

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April the month expired within which the original directors were bound to acquire their qualification shares. After the expiration of the month, and before there was any registration book of the company in existence, but after *Cammell's* name had been put on the allotment list, on the 29th of March, in respect of the forty shares, the secretary sent to *Cammell* a form of application for these shares, which *Cammell* never signed, and which he ultimately returned. In the beginning of May *Cammell* wrote once or twice excusing himself from attending the meetings of the directors, and on the 7th of May he sent in his resignation. On the 26th of July, *Cammell* having then recently ascertained that his name was on the register of members, wrote to the secretary requesting to have his name removed. In September he received a notice of a call in respect of these shares, and in October proceedings were commenced against him to enforce the call. On the 1st of November he gave notice of motion to rectify the register by removing his name therefrom."

I may here observe that *Cammell's* refusal to sign the form of application, and his resignation of the office of director, could not have been material if at that time there was in existence an actual contract to become a member of the company, as a man who has entered into such a contract has become a member in one of the modes pointed out by the Act. *Cammell*, however, did not adopt any of those modes.

The Court of Appeal, affirming Mr. Justice *Stirling's* decision, held that there was no constructive agreement on *Cammell's* part to take the shares, that the entry in the allotment sheet was not under the circumstances of the case a registration within the meaning of the *Companies Acts*, and that the directors had no authority to put his name on the register after his resignation.

The material part of that decision is that there was no constructive agreement to take the shares, although there had been acceptance of the office of director, acting as such, and attendance at meetings. The case is much stronger than this, and there is one circumstance which, if I may with all respect say so, might have led me to a different conclusion from that arrived at in that case. There had been an allotment to *Cammell*, and I think it might have been said that he, as a director, could not be heard

to say that he was not aware of it. I need not, however, trouble about that. Lord Justice *Lindley*, in his judgment, said (1): "Mr. *Buckley* contended that the articles conferred on the company an irrevocable authority to put him on the register after the expiration of the month. I do not think we can spell out of the words of the articles any such authority as that. These articles are not so strong as the articles in *Isaacs' Case* (2), where such an authority was implied. I do not think that the fact that *Cammell* sent in his resignation is conclusive; but I am much impressed with this fact—that the company did not treat him as being a shareholder in respect of these forty shares on the 29th of April, because the secretary of the company, instead of treating him as a shareholder, asks him on the 1st of May to sign an application for shares. His resignation, coupled with his refusal to do that which the company had invited him to do —viz., sign the application for shares—is, in my judgment, sufficient to put an end to the authority of the company. The company, therefore, had no warrant for putting his name on the register on the 23rd of May."

All these observations of the Lord Justice would be unnecessary if the mere fact of acting as a director and the lapse of a reasonable or prescribed time within which to qualify—in that case one month—amounted to a contract of membership. Therefore, the judgment of Lord Justice *Lindley* that there was no continuing authority to put *Cammell's* name on the register is conclusive that the contract to qualify, which arises from the acceptance of the office of director and acting as director of a company which has an article providing for the qualification of the director in shares, does not make a contract to take shares.

Ex parte Cammell (3) decides the very point left open in *Hewitt's Case* and *Brett's Case* (4), and it is clear that no contract by a director to take shares arises from the mere fact that the definite time allowed by the articles for taking his qualification has elapsed. If that is so, it is plain that a contract does not arise from the lapse of an indefinite time.

(1) [1894] 2 Ch. 398.
(2) [1892] 2 Ch. 158.
(3) [1894] 2 Ch. 392.
(4) 25 Ch. D. 283.

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Then it is said that *Ex parte Cammell* (1) does not apply because *Cammell* had actually withdrawn from his office, whereas in the present case only *Hutchinson* had definitely withdrawn. In my judgment, there has been no exercise by the directors of their authority to put the Applicants on the register. Whether a man is or is not a member of a company must depend on the circumstances existing at the time when the company goes into liquidation; and if he is not a member at that time he cannot be made so by any act of the liquidator after that time.

That is the effect of *Ex parte Cammell*; and the same idea is involved in all the judgments in *In re Wheal Buller Consols* (2). Lord Justice *Cotton*, in his judgment in that case, says (3): "No case has ever decided that acting as a director amounts to an agreement to take the shares requisite for a qualification. There are cases where a director has been held not liable for the shares requisite to qualify him; there have in some cases been observations to the effect that acceptance of the office and acting as director may make a person liable as if he had taken the qualification, but no Judge has ever acted on that view."

The facts in that case, as stated in the head-note in the LAW REPORTS, were that "*J.*, who had subscribed the memorandum of association for ten shares, was elected a director, accepted the office, and attended meetings of directors for more than three months from his election,"—the time within which he should have acquired his qualification—"but never applied for, nor had allotted to him, any other shares than his original ten." The Court of Appeal held that the acceptance of the office of director, and the continuing to act after the time by which the qualification ought to have been acquired, did not amount to a contract to take the additional shares requisite for the qualification. That decision was not based in the least degree upon a reasonable time not having elapsed. It was assumed that it had elapsed, and it was held that the mere fact of acting as a director was not enough to constitute a contract of membership as distinguished from a contract to qualify. I make these observations because I think I ought to dispose of the case on all the questions

(1) [1894] 2 Ch. 392. (2) 38 Ch. D. 42.
(3) 38 Ch. D. 49.

which can be raised; but I hold in the present case not only that the mere lapse of time is not sufficient to make the contract a contract of membership, but also that a reasonable time had not elapsed when the winding-up order was made.

The company had made no allotment, and therefore it cannot be said that a reasonable time for the directors to qualify had elapsed. One must remember that the object of inserting in articles of association this provision as to qualification is for the protection of such of the outside public as come in and take shares. The only person who had ever agreed to take shares in this company (except the signatories of the memorandum) was the vendor, and the provision was not inserted for his protection, but for the protection of other people who might come in.

I therefore hold that the names of the Applicants ought not to be on the list of contributories.

Solicitors for *Hutchinson: Hurrell & Mayo.*
Solicitors for *Betzold: Lindo & Co.*
Solicitors for *Benjamin: Collisson & Prichard.*
Solicitors for liquidator: *Munns & Longden.*

F. E.

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Nov. 8, 9, 12.

RHODES *v.* MOULES.

[1893 R. 1710.]

Solicitor—Liability for Acts of one Partner—Deposit of Securities payable to Bearer—Scope of Partnership—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *ss.* 11, 12.

The Plaintiff applied to *R.*, a member of a firm of solicitors, to obtain for him a loan on the mortgage of his freehold estate. *R.* obtained the loan from some clients of the firm, but informed the Plaintiff that the mortgagees required collateral security as well; and the Plaintiff accordingly deposited with *R.* certain share warrants payable to bearer. A mortgage deed of the freehold estate was then prepared by *R.* and executed by the Plaintiff, in which, however, no mention was made of the deposit of the share warrants or of any collateral security. The mortgagees had not in fact required collateral security, and neither they nor *R.*'s partners had any knowledge of the deposit of the share warrants. *R.* afterwards sold the shares and appropriated the proceeds to his own use and absconded. On two previous occasions the Plaintiff had deposited the same securities with *R.* to enable him to raise temporary loans, notice of which transactions appeared in the books of the firm; and it appeared that the firm were in the habit of holding securities payable to bearer, and also sums of money, for their clients:—

Held (reversing the decision of *Kekewich* J.), in an action by the Plaintiff to redeem the mortgage and to make the mortgagees and the partners of *R.* liable for the loss of the shares, that it was within the scope of the apparent authority of *R.* to take the custody of the share warrants payable to bearer, and that his partners were liable for his misappropriation of them:

But *held* (affirming the decision of *Kekewich* J.), that as the mortgagees had given no instructions to *R.* to obtain collateral security, and were ignorant of the deposit of the share warrants, he was not their agent in receiving them, and they were not responsible for their loss.

Cleather v. *Twisden* (1) considered and distinguished.

THE Plaintiff in this case was Mr. *W. Rhodes*, a landowner in *Northamptonshire*, and the Defendants were Mrs. *Alice Moules*, her son Mr. *E. Moules*, and Messrs. *Hughes & Masterman*, solicitors in London.

The Plaintiff had for some years been a client of Messrs. *Hughes & Masterman*, and of their late partner Mr. *W. O. Rew*. In September, 1889, the Plaintiff was desirous of raising a temporary

(1) 28 Ch. D. 340.

loan of £4000, and applied to Mr. *Rew* on the subject; and ultimately it was arranged that an advance should be made by Messrs. *Haes & Co.*, a firm of stockbrokers, and 280 shares in the *De Beers Consolidated Mines, Limited*, which were transferable to bearer, and forty-five subscribed shares in the same company, were transmitted by the Plaintiff to Mr. *Rew*, and by him placed in the hands of Messrs. *Haes & Co.* as securities for the advance. That loan was paid off in the month of November, 1890; and on the 29th of October of that year Mr. *Rew* wrote to the Plaintiff a letter in these terms: "I send you statement of account which shows a balance of £292 9*s.* 4*d.* in favour of my firm. The matter you will see commenced about a year ago, and I have brought everything up to date." The account inclosed was an account shewing payments made by the firm of *Hughes, Masterman, & Rew* on behalf of the Plaintiff, and the balance brought down was the sum mentioned in the letter. One item of that account was in these terms: "Our account for negotiating and procuring loan, including making payments of interest from the 29th of November, 1889, to date, £32 10*s.*"

On the 10th of November, 1890, that account was settled by payment to the firm, through the hands of Mr. *Rew*, and the receipt was signed by him as by "*Hughes, Masterman, & Rew.*" On the 29th of November Mr. *Rew* received back from Messrs. *Haes* the share warrants given as security, the loan having been repaid, and gave to Messrs. *Haes* a receipt for the 280 *De Beers* shares payable to bearer and the forty-five transfers, signed, "*Hughes, Masterman, & Rew*, solicitors for Mr. *W. Rhodes.*" On the 22nd of December Mr. *Rew* wrote to the Plaintiff a letter, in which he said: "The *De Beers* shares are now in our strong-room and at your disposal. These might be utilised in case you wanted a temporary loan at short notice."

In the month of January, 1891, the Plaintiff wanted a fresh loan, and £1000 was raised again on the deposit of the same 280 *De Beers* shares with Messrs. *Haes*, and the share warrants remained for some time in their possession. At this time the Plaintiff was desirous of obtaining a loan of a more permanent character, and accordingly he entered into correspondence with Mr. *Rew* with reference to a mortgage of freehold property of his

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called the *Hore Fields* estate; and Mr. *Rew* intimated that he had a client with whom he thought that mortgage might be negotiated. Eventually the Defendants, Mrs. *Moules* and her son, agreed to advance £6000, which they held as trustees, on the mortgage of the *Hore Fields* estate, and the transaction was completed in August, 1891. Mr. *Rew* had written to the Plaintiff stating that owing to a charge of an annuity upon the property there was some difficulty as to the sufficiency of the security, but that he thought his clients would be content to take it if they got as collateral security the *De Beers* shares, or some of them. The Plaintiff replied that he was quite willing that the *De Beers* shares should be given to the mortgagees as collateral security. He came to London on the 28th of August, 1891, to complete the transaction. He found that the *De Beers* shares were still in the hands of Messrs. *Haes*, although the £1000 had been repaid, and he obtained from Mr. *Rew* a letter to Messrs. *Haes* in these terms: "The bearer of this letter is Mr. *Wm. Rhodes*, who will be glad to have the *De Beers* shares so that he may collect the dividend. Will you kindly give them to him?" Indorsed on that was a receipt by the Plaintiff for the *De Beers* shares. Having received the *De Beers* shares from Messrs. *Haes*, the Plaintiff handed them to Mr. *Rew*, and on the same day the mortgage was executed to the Defendants *Moules* and to *Rew*, who had inserted his own name as joint mortgagee. The statement made by the Plaintiff as to the circumstances under which he left the shares with Mr. *Rew* was as follows: "Mr. *Rew* said that his clients were prepared to accept the shares as collateral security, that they were to be deposited with the firm, and that they would have charge of them providing interest was not forthcoming from the *Hore Field* property."

It appeared that *Rew* inserted his own name in the mortgage as joint mortgagee with the Defendants *Moules* with the idea that he was to be appointed joint trustee with them; but this was done without their consent, and a deed was subsequently executed by which the mortgage was transferred to the Defendants *Moules* solely. No mention was made in the mortgage deed of any collateral security, and the Defendants *Moules* expressly denied that they had ever asked for collateral security, or

had any knowledge of the share warrants being deposited with *Rew*.

The share warrants of the *De Beers* shares were placed by *Rew* in the strong-box of the firm. It appeared from the evidence that *Rew* used to cut off the coupons from the share warrants as they became due, and to send them by one of the clerks of the firm to the company's office to be cashed. Letters were produced dated the 9th of April, 1892, the 26th of September, 1892, and the 11th of October, 1892, written by *Rew* to the Plaintiff, informing him that this had been done; and on the 11th of November, 1892, a letter was written to the Plaintiff by one of the clerks, and signed "*Hughes, Masterman, & Rew*," as follows: "We have paid to the credit of your account with *Lloyd's Bank (Limited)* £245 12*s.* 6*d.*, namely, *De Beers* coupons £170 12*s.* 6*d.*, Captain *Allfrey's* rent £75."

In 1893 Mr. *Rew* absconded, having misappropriated the share warrants and applied the proceeds of their sale to his own use. The Defendants *Hughes* and *Masterman* had no actual notice of the deposit of the share warrants with *Rew*, and they denied all knowledge of the transaction. With respect to their ordinary course of business, their cashier, Mr. *Boddy*, gave evidence to the effect that as a matter of fact the firm had a large number of securities for various clients, including securities which were transmissible by delivery, and they collected for clients the dividends, &c. That course of business had been carried on for many years; they had many thousand pounds worth of securities for various clients, and also large sums of cash belonging to various clients. But there was no entry of the *De Beers* shares in the security book.

Under these circumstances the Plaintiff brought the present action, claiming as against the Defendants *Moules* redemption of the mortgaged estate and the restoration of the share warrants, and as against the Defendants *Hughes* and *Masterman*, in the alternative, a declaration that they were liable jointly and severally to make good to the Plaintiff the loss which he had sustained by reason of the misappropriation of the share warrants by *Rew* while he was a partner in their firm.

Mr. Justice *Kekewich* held that none of the Defendants were

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liable for the loss of the shares, and the Plaintiff appealed from this judgment.

Warmington, Q.C., and *Dibdin*, for the Appellant:—

With respect to the Plaintiff's claim against the Defendants *Moules*, the Plaintiff was justified in treating *Rew* as representing them. They had left the conduct of the mortgage transaction entirely in his hands, and he was a joint mortgagee with them. They are, therefore, responsible for his action in the matter. It was within the duty of *Rew* as their solicitor to advise them as to what security was necessary, and when he took possession of the share warrants his custody of them was the custody of his clients. Although they may not actually have known of the collateral security at the time, they adopted the mortgage, and in so doing they must be taken to have adopted the liability for the whole of the security that was given.

But if the Defendants *Moules* are not responsible for the loss of the share warrants, we have an alternative claim against the Defendants *Hughes* and *Masterman*, who were the partners of *Rew* at the time when the transaction took place. The Plaintiff was a client of the firm, not of *Rew* individually. The securities were kept in the strong-room of the firm, and the coupons were cashed by a clerk of the firm. The warrants were handed to *Rew*, not merely for safe custody, but that he might complete the mortgage security, and this was strictly within the scope of the business of a solicitor. In this respect the case differs from *Cleather* v. *Twisden* (1). The evidence further shews that in the present case the firm was in the habit of taking the custody of the securities for their clients; and they had received these very share warrants from the Plaintiff on two previous occasions when he was raising temporary loans, and notice of those transactions appears in the books of the firm.

Marten, Q.C., and *Boome*, for the Defendants *Moules*:—

The Defendants *Moules* did not ask for any collateral security, and they expressly deny that they had any knowledge of the deposit of the share warrants with *Rew*. They did not execute

(1) 28 Ch. D. 340.

or see the mortgage deed, nor did they know at the time that *Rew's* name was inserted as joint mortgagee. There is, therefore no ground for concluding that the shares were included in their mortgage.

Renshaw, Q.C., and *S. Dickinson* (Sir *R. E. Webster*, Q.C., with them), for the Defendants *Hughes* and *Masterman*:—

It is not alleged that there was anything special in the partnership contract which empowered members of the Defendants' firm to take securities payable to bearer for safe custody, and such a practice is not within the scope of the ordinary business of a solicitor. That was expressly decided in *Cleather* v. *Twisden* (1), following earlier authorities. It is clear from the evidence in the present case that the share warrants were deposited with *Rew* for safe custody, and not for the purpose of immediate investment. They were to be ready to be dealt with if needed, either to pay the interest on the mortgage to the Defendants *Moules*, or for any other loan which the Plaintiff might require; and in the meantime the coupons were paid by *Rew* to the Plaintiff. The other partners had no actual knowledge of the deposit, and there was nothing in the nature of the transaction or in the circumstances to give them constructive notice. The previous dealings with the securities were of a different character. They were intrusted to *Rew* in order that he might pass them to the stockbrokers who advanced the money, not that he might retain them in his own hands.

Dibdin, in reply.

1894. Nov. 12. LORD HERSCHELL L.C.:—

This is one of those painful cases in which whatever judgment is pronounced the loss must fall upon some innocent person who has not by act or default contributed to it.

The litigation in this case has arisen out of the frauds of Mr. *Rew*, who practised his profession as a solicitor in partnership with Messrs. *Hughes* and *Masterman* in the City of *London*. There is no doubt that the certificates of 280 *De Beers* shares

(1) 28 Ch. D. 340.

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were placed in his hands by Mr. *Rhodes*, the Plaintiff, in August, 1891. Those shares he has fraudulently misappropriated, and the first question is whether his partners, Messrs. *Hughes* and *Masterman*, are liable to make good the loss to the Plaintiff. Before stating the circumstances under which the shares were received by *Rew*, it is necessary to revert to some prior transactions between the Plaintiff and Mr. *Rew* acting on behalf of the firm. It is clear that Mr. *Rhodes* was a client of the firm, and that the firm had acted for him in previous matters. [His Lordship stated the facts as given above, and then proceeded as follows:—]

Some criticisms were presented to the Court on the evidence of Mr. *Rhodes*, and the learned Judge in the Court below has adverted to some inconsistencies in his evidence. I have read his evidence, and there seem to me to be no inconsistencies in it which are at all material. I think it cannot be doubted that Mr. *Rew* had represented to Mr. *Rhodes* that the lenders required some security beyond the mortgage of the freehold, that such security was to be collateral and to consist of these *De Beers* shares, and that he induced Mr. *Rhodes* to leave the *De Beers* shares with him on the representation that he would arrange with the lenders that he should hold them for them as collateral security for their loan. Whatever verbal differences there may be, I think there can be no doubt that this is the substance of the transaction in view, not merely of Mr. *Rhodes'* statements, but of the letters to which I have referred written previously by Mr. *Rew* to Mr. *Rhodes*.

The question is whether under these circumstances the firm are liable in respect of these shares which have been misappropriated in the manner I have mentioned. It is said that they are not, inasmuch as it was beyond the scope of Mr. *Rew's* authority as a solicitor to take the shares for any such purpose, or under such circumstances, and that, inasmuch as his partners were admittedly ignorant of his having so taken them, they cannot be bound by the transaction or incur any liability in respect of it. It is clear that on previous occasions the firm had acted for Mr. *Rhodes* in negotiating loans, and in receiving from him these very securities and transmitting them to the lenders,

and in the first instance certainly receiving them back from the lenders. That that was a firm transaction I think it is impossible to dispute, because, as I have shewn, it passed through the books of the firm, the firm credited themselves with the charges in respect of it, and an account was sent in in the name of the firm, and that account was discharged by Mr. *Rhodes*. Therefore, it is impossible to dispute that Mr. *Rhodes* had on the previous occasion actually carried through a transaction with the firm, and as a part of the transaction they not only negotiated the loan, but received from him these very securities to be handed to the lender. Even apart from that, I am not satisfied that it would be outside the scope of a solicitor's business when they were negotiating a loan for one of their clients to receive from him securities, whatever their nature, for the purpose of transmission to any of their clients who were making the loan. It is not necessary to decide that as a matter of law; all I say is, I am not satisfied. But, in the present case, having regard to the prior dealings of this gentleman with the firm, I think it is impossible for them to say that Mr. *Rhodes* was not perfectly justified in assuming that the partner with whom on this occasion he dealt had authority from the firm to receive from him the shares which he handed for the purpose of carrying out the mortgage transaction which they were negotiating for him. If these shares had been handed over to the lenders, the transaction would be on all-fours with the one which had been previously carried through by him on behalf of the firm. In the present case it is true that the shares were not handed over to the lenders; but Mr. *Rew* represented to the Plaintiff that this was by arrangement between him and the lenders, who were also his clients, and who had arranged that he, or rather that the firm, should hold the securities on behalf of the lenders instead of handing them over to him. It seems to me that that can make no possible difference in the result. That was merely a matter between Mr. *Rew*, or the firm, and their other clients with whom they had negotiated the loan. If in fact that authority had been received—a question which I shall have to deal with presently—it seems to me it would be quite immaterial whether the transaction was carried

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out in that way or by Mr. *Rew* receiving them to hand them over afterwards to his clients, the lenders.

For these reasons, apart from authority, I find it difficult to discover any ground upon which it could be said that Mr. *Rhodes* was not justified in treating, and entitled to treat, the transaction as a transaction with the firm which rendered, not Mr. *Rew* only, but the firm responsible, if the shares received under the circumstances I have detailed were misappropriated and not forthcoming. This, of course, is subject to the question whether the firm had discharged themselves by shewing that they were held for the Defendants *Moules* under such circumstances that those Defendants are liable to the Plaintiff; in which case, of course, the firm would be discharged from liability, because they would in fact have handed them over to the lenders, and be freed from responsibility to Mr. *Rhodes*, the lenders being then the persons responsible; but that is a subsequent part of the case which I will deal with presently.

The Defendants relied mainly upon the case of *Cleather* v. *Twisden* (1), decided in this Court in the year 1884. It was said that this case established that it was not part of the business of a solicitor to take over for custody bonds payable to bearer, and, consequently, when one partner had done so without his other partners being aware of it, they were under no liability if he misappropriated them. I do not think that case covers the present one. In the view which I take, these bonds were not handed to Mr. *Rew* merely for safe custody: they were handed to him in connection with a mortgage transaction which he was carrying out, in order that they should pass through him as collateral security to the lenders for whom he was acting. But it is to be observed that in the case of *Cleather* v. *Twisden* Lord Justice *Bowen* said (2): "The claim is against the firm to which *Parker* belonged in respect of the custody of certain bonds by *Parker*. This is conceded to be beyond the ordinary scope of the business of solicitors, though, of course, it may be brought within it by special circumstances." There was, therefore, there no evidence on the question; but it was conceded by those who were arguing the case that such a trans-

(1) 28 Ch. D. 340. (2) 28 Ch. D. 349.

action was beyond the ordinary scope of the business of solicitors. It cannot be said, therefore, that in that case it was held as a matter of law to be so, because obviously when that had been conceded as a matter of fact any finding as a matter of law would have been superfluous. So that I do not think the case can be taken as a decision in point of law that such a transaction would be beyond the scope of the solicitor's authority. As the Lord Justice said, it must depend upon the special circumstances; and certainly if it were to appear that it had been part of the practice of solicitors in the City to take securities of this description for safe custody, or if indeed in the case of a particular firm it appeared that such had been the practice, the case would have been one requiring the Court to determine whether in the case of that firm at all events, if not generally, it was not a matter within the scope of the authority of one of the partners. I should say the decision in *Cleather* v. *Twisden* (1) appears to me substantially to have amounted only to this, that *Parker* had really taken charge of these bonds for a client as a personal matter as between him and that client, as a solicitor of course, but still not as a member of the firm, but as an individual. That seems to have been the conclusion at which the Court arrived, and there were undoubtedly circumstances which point to that conclusion to which it is not necessary to refer further. Lord Justice *Bowen* says this (2): "That the bonds were in the custody of *Parker* is common ground, the real question is whether in letters for which the firm are responsible, language has been used which would justify the plaintiffs in assuming that *Parker's* custody was the custody of the firm." In the present case I have a difficulty in seeing how it can be doubted that letters for which the firm were responsible—letters relating to the previous transactions to which I have alluded, which passed through the letter-book of the firm, charges made by the firm and paid by the Plaintiff—would justify the Plaintiff in assuming that when *Rew* received those shares he received them, not as an individual, but on behalf of the firm, and that his receipt of them was the receipt of the firm. In Lord Justice *Fry's* judgment he says this (3): "He"

(1) 28 Ch. D. 340. (2) 28 Ch. D. 351. (3) 28 Ch. D. 356.

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(that is, *Parker*) "was advising the trustees in the realization of the property, and I do not doubt that as to any parts, such as the mortgages, which were received by *Parker* for distribution the firm would be responsible; but as to the bonds they were not received for the purpose of distribution but for safe custody long before the distribution began." Therefore, I do not see any reason to think that if circumstances such as we have in the present case had been brought before the Court which decided that case—if they had been aware of such previous transaction as we are aware of here, and had seen that the securities were received in connection with a mortgage transaction in the way they were here—they would have come to any other conclusion than that at which we have arrived.

But then it is said on behalf of the Plaintiff, the Defendants *Moules* are responsible for these shares, and the receipt of them by Mr. *Rew* was a receipt on their behalf. He held them on their behalf, and whatever the liability of the firm to the *Moules* they cannot call upon the Plaintiff to repay the sum lent without not only reconveying to him, but giving up to him these *De Beers* shares. In order to establish this case I think they must make out two things: first, that Mr. *Rew* did in fact receive and hold these *De Beers* shares for the Defendants *Moules*; and, secondly, that he did so with the authority of the *Moules*. Now, I have not been satisfied that he did in fact receive them, or ever intended to receive them and hold them for the *Moules*. No doubt he led Mr. *Rhodes* to believe that he did; but that is quite a different question.

The case is a very peculiar one. Mr. *Rew*, when he drew up the mortgage from Mr. *Rhodes* to the *Moules*, made himself a mortgagee, not only without any authority to do so, but without any legitimate reason for doing so. He was, of course, not a mortgagee. He had told Mr. *Rhodes* that the mortgagees would require some collateral security, and that he thought they would take the *De Beers* shares. He had no communication on the subject with the *Moules* at all; they never required further security, and he never communicated with them on the subject He told Mr. *Rhodes* that it was by arrangement with them that the shares were to be left in the custody of the firm. No such

arrangement had been made; and again, as I have said, there was no communication on the subject. We know that Mr. *Rew* had commenced the *Stock Exchange* transactions which ultimately led to his ruin at a date prior to this, viz., in the January of that year, and he ultimately did dispose of those shares as his own. Under those circumstances I cannot say, in the absence of any evidence, that he ever identified them as their property, that he ever put them in an envelope or wrote their name on them, or did anything to earmark them as theirs; and, in view of the falsehoods and irregularities to which I have referred, I cannot be satisfied that at the time he received those shares he ever meant to hold them really for the *Moules*. But even if he did, is there evidence that he had authority to receive and hold these shares on behalf of the *Moules* so as to make them liable? It was not suggested that he received any express authority, that they ever actually heard anything of the transaction; but it is said that he had a general authority, that the whole of the business in connection with the estate in which they were interested was left so entirely to Mr. *Rew* that he was intended to be by them absolutely master of the situation, taking what he pleased and doing what he pleased. Now, I have read the correspondence, and it conveys to my mind precisely the opposite impression. I do not find Mrs. *Moules* leaving everything to him in that blind way at all. She requires to know about everything. He professes to tell her about everything. He asks her approval at every step, and that approval is conveyed, and doubts were sometimes suggested, and, seeing that neither she nor her son ever learned that these shares had been taken or held for them by Mr. *Rew* or the firm, it seems to me it would be somewhat extravagant to arrive at the conclusion, notwithstanding all that, that they were held by the firm or Mr. *Rew* for the *Moules*, or that, having been in effect handed to them, they had become responsible for them.

For these reasons I am unable to come to the conclusion that the Defendants the *Moules* are liable. I do not think that the firm who undoubtedly received these shares from Mr. *Rhodes* have discharged themselves of liability. It follows in the result, I think, that as regards the *Moules*, the appeal should be

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dismissed with costs; and as regards the other Defendants the judgment must be reversed with the usual result, and that judgment with costs should be for the Plaintiff.

LINDLEY L.J.:—

In this action the Plaintiff seeks to make four Defendants liable for the loss of certain share certificates transferable to bearer, and given by him to one *Rew* and misappropriated by *Rew*. *Rew* is said to have obtained these share certificates from the Plaintiff as agent for the Defendants, the two *Moules*, and as partner of the Defendants *Hughes* and *Masterman*. All four Defendants are sought to be made liable as *Rew's* principals; but, although the Plaintiff relies on the law of agency in order to establish liability on the part of all the Defendants, the Plaintiff's case against *Rew's* clients, the two *Moules*, is so different from his case against *Rew's* partners that it is necessary to examine the two cases separately.

I will first take the case made against *Hughes* and *Masterman*, who were *Rew's* partners. The law applicable to the case against them is thus stated in the *Partnership Act*, 1890 :—

Sect. 11: "In the following cases; namely—(*a*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and (*b*) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm; the firm is liable to make good the loss."

Sect. 12: "Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections."

The facts bring this case within this enactment. *Rew*, *Hughes*, and *Masterman* were partners; and *Rew* certainly was acting in his transactions with the Plaintiff as a member of the firm. The Plaintiff wanted to borrow money on some property in *Northamptonshire*, and he applied to *Rew* as a solicitor to assist him to effect the necessary mortgage. Some clients of the firm—namely,

the two *Moules*—were said to be willing to lend the money; but, the Plaintiff's interest in the land being subject to an annuity, *Rew* said that the rents were not sufficient to cover the interest, and that the Plaintiff's shares might be brought in as further security. Accordingly, on the 28th of August, 1891, the Plaintiff obtained the shares from his brokers and lodged them with *Rew*. At the same time the Plaintiff executed a mortgage of the land referred to, and left that also with *Rew*. So far the transaction was an ordinary business transaction, and such as solicitors are in the daily habit of conducting. It is every-day practice for a solicitor to act for both borrower and lender in a mortgage transaction, and to receive from the lender the money to be lent to the borrower in order to hand it to him, and to receive from the borrower the deeds and other securities on which the money is raised, and to keep those deeds and securities for the lender until he wants them, or until the loan is paid off. What *Rew* did was neither more nor less than to receive the Plaintiff's share certificates as part of an ordinary business transaction of this description. It is said that the ordinary course of business does not extend to the receipt of securities payable to bearer; but there is no authority for this proposition, nor is there any evidence to shew that this is so in fact. Moreover, there is evidence to shew that this firm, at all events, received such securities for the Plaintiff and other clients.

The only conclusion at which I can arrive is that the Plaintiff's certificates came into *Rew's* hands when acting within the scope of his apparent authority. The case is thus brought within the first half of sect. 11 of the *Partnership Act*, 1890. But it is also, I think, brought within the second half. The letters of the 22nd of December, 1890, 9th of April, 1892, 26th of September, 1892, and the 11th of October, 1892, the ledger account, and *Boddy's* evidence, coupled with the facts to which I have already alluded, justify the inference that the Plaintiff's certificates were received by the firm in the course of its business. I should not hesitate to draw this inference myself. The case of *Cleather* v. *Twisden* (1), on which the Defendants so much relied, is clearly distinguishable from the present. The securities there were

(1) 28 Ch. D. 340.

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deposited for safe custody only. They did not come into the hands of the firm or of any of its members as part of a transaction which was being conducted by the firm or any of its members in the ordinary course of business. There was no business being conducted, except the deposit itself. But in the very same case it was conceded that the firm was liable for money received by one of the partners for investment on mortgage and misapplied by him (1).

I now pass to the case of the two *Moules*. It is contended that *Rew* obtained the Plaintiff's share certificates for them, and with their authority, and that his receipt was their receipt, and that they are consequently liable for their value. It is abundantly plain that *Rew* purported to act for them in this matter. Mr. Justice *Kekewich* appears to have thought that the *Moules* could not have ratified what he did. I cannot agree with the learned Judge on that point. In my opinion the *Moules* could have ratified *Rew's* acts, and have held the certificates as part of their security, if they had been so minded. But they never did, and of course they disclaimed all interest in the certificates when they knew the facts. *Rew's* authority to act for them in this matter is not proved; and my own conclusion from the evidence is that he had no such authority. The *Moules* never knew anything about the shares until *Rew* absconded. They had agreed to lend money on the Plaintiff's *Northamptonshire* estates; and they authorized *Rew* to act for them in that matter. When he got the Plaintiff's certificates no document was ever signed to shew that they were part of the *Moules'* security. It is said that the *Moules* left everything to *Rew*; but "everything" is a large and vague word. No doubt they left him to manage everything incidental to carrying out the mortgage which they authorized; but they never left him free to accept as a security for them anything more than, or different from, the mortgage which they had approved. The agency in this case is not, in my opinion, established, and, there having been no ratification, there is no liability.

The appeal must therefore be dismissed with costs as against the *Moules*; but it must be allowed with costs, both here and

(1) 28 Ch. D. 341.

below, as against *Masterman* and *Hughes*; and they must be declared jointly and severally liable for the value of the shares, the certificates of which *Rew* misappropriated, and there must, if necessary, be an inquiry as to such value, and *Masterman* and *Hughes* must be ordered to pay it.

A. L. SMITH L.J.:—

It is unnecessary for me to recapitulate in detail the facts of this case, for those which are material have been fully dealt with by the Lord Chancellor and Lord Justice *Lindley*; but, as I am differing from part of a judgment of the learned Judge in the Court below, it is right that I should state the grounds upon which I arrive at the conclusion I do.

The error which, in my opinion, Mr. Justice *Kekewich* fell into, was in assuming as he did that the case of *Cleather* v. *Twisden* (1) upon its facts was the equivalent of the present, and that therefore the questions formulated by Lord Justice *Bowen* in that case were those which were to rule in this case, and if answered in one way should settle this case in favour of the Defendant solicitors. It is true that the present case and *Cleather* v. *Twisden* are similar in this, that in each securities payable to bearer were deposited by the owner with one member of a firm of solicitors who afterwards misappropriated them; but when the facts of each case are ascertained it will be seen that although there is this *primâ facie* likeness between the two cases there are yet radical differences between them.

In the first place, in the present case it was proved that at the time when the share warrants, the subject of this action, were deposited with *Rew*, the delinquent partner, for the purposes of the loan, the Plaintiff was a client of the Defendant firm to the knowledge of the partners therein, and also, as found by Mr. Justice *Kekewich*, that the Plaintiff throughout the transaction relating to the procurement of the loan dealt with *Rew* as a member of the firm. No such facts were proved in *Cleather* v. *Twisden*; but on the contrary, it was contended by the defendant that the plaintiff in that case had dealt with *Parker*, the delinquent partner, only in the character of a private friend, and

(1) 28 Ch. D. 340.

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not as member of the firm. In the next place it is not conceded in the present case, as it was in *Cleather* v. *Twisden* (1), that it was not within the ordinary scope of the business of a solicitor to receive and hold bonds of a client payable to bearer, and it was proved in the present case that upon two occasions prior to the occasion out of which this action arises, the firm through *Rew* had received from the Plaintiff securities payable to bearer in order that they might obtain loans of money thereon on behalf of their client, the Plaintiff, and had been paid for so doing by the Plaintiff. The deposit of the securities in the present case was made by the Plaintiff with *Rew* for the purpose of procuring a loan which the firm through *Rew* had undertaken to procure if possible for the Plaintiff, whereas in *Cleather* v. *Twisden* it was found by the Court that the bonds were not deposited with *Parker* for the purposes of any business the firm was then transacting for the plaintiff, but were deposited with *Parker* for safe custody. Again, evidence in the present case (see *Boddy's* evidence) was given that the Defendant firm were in the habit of receiving from and holding for clients bonds payable to bearer as well as cash, whereas in *Cleather* v. *Twisden* it was shewn that the defendants therein were not in the habit of so doing. The letters to the Plaintiff for which the Defendant firm are responsible in my judgment are such as to justify the Plaintiff in concluding that *Rew's* custody of the securities was that of the firm, whereas the letters in *Cleather* v. *Twisden* were held by the Court not to do so; and, lastly, in *Cleather* v. *Twisden* there were no dealings by the firm with the coupons of the bonds as in this case, and no accounts were sent to the plaintiff, whereas accounts were sent to the Plaintiff by the firm in the present case. That these constitute radical differences between the two cases cannot be denied, and in my judgment *Cleather* v. *Twisden* (which the learned Judges who decided it in this Court declared to be a case upon the border-line) by no means governs the present.

Now, what have we in this case? We have it proved that the position of solicitor and client existed between the Defendant firm and the Plaintiff in relation to the proposed loan of £6000

(1) 28 Ch. D. 340.

to the Plaintiff; that on two previous occasions the Defendant firm had also acted as his solicitors in obtaining loans of money for him; that upon all three occasions *Rew*, on behalf of the firm, had transacted the Plaintiff's business; that upon all three occasions shares payable to bearer were deposited by the Plaintiff with *Rew* to be utilized in obtaining the loans negotiated by the firm through *Rew*; that the Plaintiff believed, and was well warranted in believing from letters and accounts received by him and for which the firm were responsible, that *Rew* was acting on behalf of the firm both in negotiating the loan and receiving and holding the bonds for that purpose. It is true that the partners did not know of the deposit of these securities payable to bearer with *Rew*; but in my judgment this is immaterial if the firm were the solicitors of the Plaintiff in negotiating the loan for the Plaintiff, and *Rew* was acting upon firm's business within the scope of his authority when he negotiated the loan and received the share warrants for that purpose. I cannot myself see what ground there is for holding upon the proved facts of this case that *Rew* was acting outside the scope of his apparent authority in the third transaction when he was acting within the scope of that authority in the two prior transactions, for which the firm have sent in bills and been paid. In my judgment these prior transactions, the proved fact that the Defendant firm did receive and hold securities of their clients, whether payable to bearer or not, as also cash, and the letters and accounts received by the Plaintiff constitute evidence from which only one inference can be drawn, which is, that *Rew* was acting within the authority granted to him by his partners in negotiating the loan for him and in receiving and holding the share warrants for that purpose, and it cannot be maintained that he was not.

It is clear from the last passage in the judgment of Lord Justice *Fry* in *Cleather* v. *Twisden* (1) that the learned judge, even upon the facts proved in that case, was of opinion that if the bonds had been deposited with *Parker* upon the firm's business, the firm would have been responsible, for he says: "I do not doubt that as to any parts, such as the mortgages, which

(1) 28 Ch. D. 356.

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were received by *Parker* for distribution" (that is, firm's business) "the firm would be responsible; but as to the bonds they were not received for the purpose of distribution but for safe custody long before the distribution began," *i.e.*, not upon firm's business.

In my judgment, upon the facts of this case, the innocent partners of *Rew* are liable to the Plaintiff to make good *Rew's* defalcations as regards these shares, and consequently the appeal of the Plaintiff as to the case of the Defendant solicitors must be allowed, and judgment entered for the Plaintiff against them. As to the Plaintiff's appeal against the *Moules*, I agree that it should be dismissed, for the reasons given by the Lord Chancellor and Lord Justice *Lindley*, and that as to this the learned Judge was correct in the judgment he arrived at.

Sir *R. E. Webster*, Q.C., for the Defendants *Hughes* and *Masterman*, said that the *De Beers* shares had been sold for £5421, but might possibly be repurchased for a less amount. He submitted that the Defendants ought to be at liberty to replace the shares, if they could, instead of paying the Plaintiff the amount for which they were sold. If the Plaintiff recovered his shares he would have sustained no loss.

LORD HERSCHELL L.C. said that, in his opinion, the Plaintiff was entitled to recover the money for which the shares were sold; which was their value at the time when they were converted by *Rew* to his own use.

LINDLEY and A. L. SMITH L.JJ. concurred.

Solicitors: *Bridges, Sawtell, Heywood & Co.; Hempson & Elgar; Janson, Cobb, Pearson & Co.*

M. W

In re RAILWAY TIME TABLES PUBLISHING COMPANY. *Ex parte* WELTON.

C. A. 1894 KEKEWICH J. *Aug.* 7. C. A. *Nov.* 21.

Company — Winding-up — Adjustment of Rights of Contributories — Shares issued at a Discount — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 38— *Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

The articles of association of a limited company empowered the directors to allot shares at a discount, and provided that, if the company should be wound up, and the surplus assets should be insufficient to repay the whole of the paid-up capital, such surplus assets should be distributed so that, as nearly as might be, the losses should be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them respectively at the commencement of the winding-up: "But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions." In the winding-up of the company, the debts and the costs of winding up having been paid:—

Held, that notwithstanding the above clause, the decisions in *In re Almada and Tirito Company* (1) and *In re Weymouth and Channel Islands Steam Packet Company* (2) applied, and the holders of shares issued at a discount must, for the purpose of adjusting the rights of the contributories *inter se*, pay up their shares in full.

Ooregum Gold Mining Company of India v. *Roper* (3) commented on.

SUMMONS by the liquidator of this company for a call of £2 5*s.* per share upon shares of which Mr. *T. A. Welton* was the holder.

The company was registered in January, 1886, with limited liability, the capital being 30,000, divided into 6000 shares of £5, with power to increase.

The articles of association contained the following clauses:—

(4.) "The shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such persons, on such terms and conditions, and at such times as the directors think fit, and either at a discount, premium, or otherwise."

(41.) "The company may, from time to time, increase the

(1) 38 Ch. D. 415. (2) [1891] 1 Ch. 66.
(3) [1892] A. C. 125.

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In re RAILWAY TIME TABLES PUBLISHING COMPANY. *Ex parte* WELTON.

capital by the creation of new shares of such amount as may be deemed expedient."

(42.) "The new shares shall be issued upon such terms and conditions, and with such rights and privileges annexed thereto, as the directors shall determine, and in particular such shares may be issued with a preferential or qualified right to dividends, and in the distribution of assets of the company, and with a special, or without any, right of voting."

(140.) "If the company should be wound up, and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them respectively at the commencement of the winding-up. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions."

The whole of the 6000 shares, except ten, were allotted as fully paid up to the vendor to the company of the property and business which the company was formed to acquire.

In June, 1886, a special resolution was passed to increase the capital of the company by the creation of 2000 new shares of £5 each. Of these shares 600 were issued as "bonus" shares, upon which nothing was paid, and 900 were issued at a discount of £4 10*s.* per share, that is, only 10*s.* per share was paid for them. In December, 1886, another special resolution was passed to increase the capital by the creation of 5000 additional shares of £5 each. These shares were all issued at a discount of £4 10*s.* per share. Mr. *Welton* was the holder of some of the discount shares. In the winding-up of the company he was placed on the list of contributories in respect of those shares, and a call of £2 5*s.* per share was made upon him and the other holders of discount shares for the purpose of paying the debts of the company and the costs of the winding-up. Mr. *Welton* did not dispute his liability in this respect.

The liquidator now sought to make a further call of £2 5*s.* per share on the discount shares, for the purpose of adjusting the rights of the contributories *inter se*. Mr. *Welton* disputed his

liability to a call for this purpose, and the hearing of the liquidator's summons was adjourned into Court. The summons was heard before Mr. Justice *Kekewich* on the 7th of August, 1894.

Renshaw, Q.C., and *Whinney*, for the liquidator, in support of the summons:—

The holders of shares issued at a discount are liable in the winding-up of the company to pay or contribute the unpaid part of the nominal value of their shares, and this liability exists, not only as between such shareholders and the creditors of the company, but also as between such shareholders and their fellow-shareholders. The question of the extent of the liability was considered by Lord *Herschell* in *Ooregum Gold Mining Company of India* v. *Roper* (1). That was not the case of a winding-up, but of a going concern; and the only point really decided in that case was that the issuing of shares at a discount was illegal, at all events to the extent to which the unpaid part of the nominal value of the shares was required for the payment of debts. Lord *Herschell*, however, at the end of his speech on p. 143 of the report, appears to have intimated that the liability extended no further; and if that is so, *Welton* in the present case would not be liable to pay or contribute anything in respect of the discount shares beyond what was necessary for payment of the debts and the costs of the winding-up. But the observation of Lord *Herschell* was obviously made *obiter*, and not after argument; and Lord *Halsbury* (2) guarded the House from the adoption of it. The weight of authority is clearly the other way. One of the earliest cases is *In re Anglesea Colliery Company* (3), where it was held that a holder of fully paid-up shares is a "contributory," and that a call could be made upon partly paid-up shareholders for the purpose of adjusting the rights between them and the fully paid-up shareholders. The judgment of the Master of the Rolls (Sir *George Jessel*) in *Burgess's Case* (4) shews that a shareholder, to relieve himself of any part of the liability to contribute imposed by sect. 38 of the *Companies Act*, 1862, must

(1) [1892] A. C. 125.
(2) Ibid. 149.
(3) Law Rep. 2 Eq. 379; 1 Ch. 555.
(4) 15 Ch. D. 507.

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establish the existence of some right as between him and his fellow-shareholders which precludes them from compelling him to make payment of calls. See also *In re Provision Merchants' Company* (1), where a call was made for the equalization of shares notwithstanding an alleged understanding that no call should be made except in case of insufficiency of the assets to discharge debts; and see *Buckley* on Companies (2). But in truth the matter is concluded by the case of *In re Weymouth and Channel Islands Steam Packet Company* (3), where the Court of Appeal (affirming the decision of Mr. Justice *North*) held that, as between discount shareholders and ordinary shareholders, there was no contract express or implied that in the event of debts being satisfied the discount shareholders should have any preference. The *dictum* of Lord *Herschell* in *Ooregum Gold Mining Company of India* v. *Roper* (4) must be read subject to the provision of sect. 25 of the *Companies Act*, 1867, that every share shall "be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash." The result of the authorities is that, under sect. 38 of the *Companies Act*, 1862, and sect. 25 of the *Companies Act*, 1867, the holder of a share is, on the winding-up of the company, liable to pay up the nominal amount in full, unless he can shew that there is some right or equity which cuts down that liability. Such a right or equity must depend either on contract or estoppel. Here, there was no contract between the discount shareholders and the other shareholders: the only contract was between the discount shareholders and the company for the issue of shares at a discount; and that contract was illegal, and knowledge of the illegality must be imputed to the discount shareholders. Nor was there any estoppel, for that only arises when something is said contrary to the truth, and the resolution for the issue of the discount shares did not contain or involve any such statement. There is nothing special in this case. The provisions of art. 140 of the articles of association cannot override the express provision in sect. 38 of the *Companies Act*, 1862.

(1) 26 L. T. (N.S.) 862.
(2) 6th Ed. pp. 293, 294.
(3) [1891] 1 Ch. 66.
(4) [1892] A. C. 125.

John Chester, for a shareholder, referred to *In re Wakefield Rolling Stock Company* (1).

Eve, for Mr. *Welton*, contended that it was *intra vires* of the members of a company to come to an agreement between themselves, throwing a greater burden on one class of shareholders to the relief of another, subject always to the paramount rights of creditors. It was in substance a contract between partners, their rights under which the Court would enforce as between themselves. [He cited *Maxwell's Case* (2), *McKewan's Case* (3), and the *Companies Act*, 1862, ss. 14, 16, 18, 23, 25, 38, sub-ss. 4 and 6, 74, 109, and 133.]

KEKEWICH J.:—

Whether a case of this kind is likely to occur again frequently or not, there is no doubt that it is one of considerable importance; and I apprehend that the strength of Mr. *Eve's* position, and the strength also of his argument, and certainly the difficulty of the case, depend upon what was said by the present Lord Chancellor in *Ooregum Gold Mining Company of India* v. *Roper* (4). It is not pretended that what fell from Lord *Herschell* in that case was in any way necessary to the decision of the point before the House, and to that extent what his Lordship said may fairly come within the class of *obiter dicta*; but, of course, anything said by Lord *Herschell* as a Judge, irrespective of his present position, deserves the very greatest respect from me; and, more than that, anything said by any member of the ultimate Court of Appeal must be regarded with scrupulous care. I need scarcely add that I entertain a considerable amount of diffidence in not being able to follow the reasoning of Lord *Herschell* in that case; but I think it is right, having regard to his position and the place where the words were uttered, to express my reasons as clearly as I can.

Mr. *Welton*, represented by Mr. *Eve*, accepted shares in this company that were issued at a discount. I will take these shares as a sample, because, although there are other classes of

(1) [1892] 3 Ch. 165.
(2) Law Rep. 20 Eq. 585.
(3) 6 Ch. D. 447, 458.
(4) [1892] A. C. 125.

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shares, such as bonus shares and others, respecting which the argument has arisen, what is true of the discount shares will at least be true of the other shares in equal degree. Mr. *Welton* has been held to be a contributory as regards those shares for the whole amount unpaid in cash, according to the 25th section of the *Companies Act*, 1867, and in that decision he has acquiesced. But he says that all he is required to do is to contribute to the claims of creditors and the costs of winding up, and that when the stage which has now been reached has been arrived at—that of adjusting the rights of contributories among themselves—then he is not liable, because there was what he has called, and I will venture to call also, a "contract" between him and the other contributories that these shares should be issued, not as carrying the liability to pay the full amount in cash, but as carrying a lesser liability; and that the other contributories cannot, now it has come to a question of the rights of the contributories *inter se*, insist on his paying the full amount in cash. I use the word "contract," as it has been used in argument for such an arrangement, and because I know of no other word which will fit the case, and I avoid the use of the word "*quasi*-contract"; but really, to my mind, the question is whether there is, in any strict sense of the word, a contract at all.

There is no occasion to go through the sections of the Act of Parliament, though it was perhaps necessary for counsel to call my attention to them, because it is conceded that there is the liability of ordinary shareholders not only to contribute to debts and costs, but also to the adjustment of rights *inter se*. All that is said is that these provisions are not applicable to this particular case because of the contract to which I have just referred.

Now, under what circumstances is the contract entered into? The shareholders in general meeting—and I will assume for this purpose all the shareholders, without stopping to consider how many were present, and how many voted by proxy or otherwise—agree that these shares shall be issued at a discount: of course, that was not so in so many words; but I wish to put the case as strongly as I can. The 25th section of the Act of 1867 says: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of

the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing," which was not done here. It has now been held and finally settled, in the case of *In re Almada and Tirito Company* (1) that any resolution of that kind is *ultra vires*, that it is not within the powers of the company, even by unanimous resolution, to issue shares at a discount; and in that sense—in the sense in which it is *ultra vires*—it may be said that the shareholders could not in general meeting, even if they were all present, so ratify a contract of that kind as to make it binding on the company. That is, I apprehend, the meaning of *ultra vires* the company. That might still leave it open to the shareholders to take the burden on themselves individually—to debar them from saying that it is not binding on them individually. But, surely, their issuing shares at a discount is something more than *ultra vires* the company. In some of the cases on the point that is called "illegal." In one case it is called "not legal." There may be some difficulty in determining what is the precise epithet by which to style the issue of shares at a discount which is forbidden (so the Court of Appeal has held) by statute; but at any rate you come to this, that it is forbidden by statute: it is illegal at any rate in this sense, that the law says it shall not be. Is it possible to have a contract which the law says shall not be entered into? Mr. *Eve* says, "Yes, you can have a contract between the parties, though it is not a contract to which the company is a party:" but, to my mind at any rate, there is great difficulty in principle in saying that a contract which the statute has forbidden, and says shall not be, can take place in one way more than another. That, I think, is concluded by authority. I have before me a reported decision of Mr. Justice *Stirling* in this very company, but before the winding-up: *In re Railway Time Tables Publishing Company, Ex parte Sandys* (2). He quotes (3) the judgment of Lord Justice *Cotton* in *In re Almada and Tirito Company*, and then says: "The Lord Justice *Cotton* held that the contract in that case, which was substantially the same as the

(1) 38 Ch. D. 415.
(2) 42 Ch. D. 98.
(3) 42 Ch. D. 104.

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one I have to consider in the present case, was beyond the powers of the company to enter into. Lord Justice *Fry* and Lord Justice *Lopes* expressed an agreement in general terms with the reasons of Lord Justice *Cotton*. Certainly they expressed no dissent whatever from that position. Then if the contract be *ultra vires* of the company it is not merely voidable, but it is absolutely void, and as Lord *Cairns* said in a well-known case it is incapable of being ratified by the whole of the shareholders of the company even if they were assembled in one room and voted to that effect." Having regard to the language of that learned judge there, I do not think he was directing his attention to a contract merely *ultra vires* the company, and which might be a contract good as between the shareholders, but what he says is possibly open to that distinction.

But what was said in *In re Weymouth and Channel Islands Steam Packet Company* (1) does not seem to me to be open to any such remark. Mr. Justice *North* says (2): "Mr. *Cozens-Hardy's* principal argument was this, that, although no doubt what was done was illegal"—that was an issue of shares at a discount—"as between the creditors and the contributories of the company, yet it was perfectly open to all the contributories to make such an agreement *inter se*, and that there is sufficient evidence that this was really done. If all the shareholders had been present in the same room, and had all agreed to it, there was nothing illegal in the bargain—nothing to incapacitate them from contracting to that effect; and Mr. *Hardy* says it must be taken as between the shareholders (the creditors being got rid of) that the assent of all was actually given. Mr. *Hardy* referred to one or two cases as tending in that direction; but I do not think they go further than that. I feel great difficulty in seeing how it would be possible to say that all the shareholders were bound." That case came on before the Court of Appeal, who agreed with Mr. Justice *North*. Lord Justice *Bowen* concludes his judgment in this way (3): "If there was a contract as between the individuals as suggested—and suggested without reason—it can only be a contract between the indi-

(1) [1891] 1 Ch. 66. (2) [1891] 1 Ch. 75.
(3) [1891] 1 Ch. 81.

viduals that each should make an illegal contract with the company—a contract with the company which is *ultra vires* of the company. Such an agreement, if made, could not be enforced against present, and certainly would not bind future, shareholders."

That seems to me to conclude the point which has been argued here. To my mind, it being once decided that the issue of shares at a discount is illegal, in the sense of being forbidden by statute, the result is that the issue can confer no rights at all, and the agreement of parties confers no rights on themselves *inter se.*

I approach what Lord *Herschell* says from that point of view. Now, the first remark I make is that it was not necessary for the decision of the case before the House. Lord *Watson* said (1) that he had had an opportunity of considering the suggestions to be made by Lord *Herschell,* and agreed with him; but his agreement was based on sect. 5 of the *Companies Act,* 1879, to which Lord *Herschell* does not refer. Then, before turning to Lord *Herschell's* own language, I observe that Lord *Macnaghten,* who also addressed the House at considerable length, and Lord *Morris,* who expressed a shorter opinion, do not allude to this point at all; and ultimately Lord *Halsbury,* being then Lord Chancellor, says this (2): "My Lords, before putting the question, I only desire to add that I have designedly avoided alluding to the point which has been mentioned by my noble and learned friend, Lord *Herschell,* inasmuch as it was neither insisted upon nor argued at the Bar." Lord *Herschell's* remarks, so far as they are directly in point here, are prefaced by these words (3): "Except when the Legislature has expressly or by implication forbidden any act to be done by a company, their rights," and so forth; and his conclusion is governed by that preliminary observation from first to last.

It would not be agreeable to me, and I do not think it would be right, that I should criticise Lord *Herschell's* language. Probably he had not before him at the moment the question of the issue of shares at a discount, as now regarded by the practice

(1) [1892] A. C. 138. (2) [1892] A. C. 149.
(3) [1892] A. C. 143.

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of the Court. I cannot think he meant to say decisively and judicially that in such a case the Legislature had not expressly or by implication forbidden that act to be done; and, though treating what falls from him, as I have already said, with the greatest possible respect, I do not think his *dictum* is binding on me; so that I am bound to exercise my own judgment to the best of my ability, and I must treat it as not governing this case. I must follow authorities which I consider binding, and which agree with my own view, and hold that Mr. *Welton* is liable to contribute, not only to the debts and costs, but also to the adjustment of the rights of contributories *inter se*.

G. I. F. C.

C. A.

Mr. *Welton* appealed. The appeal was heard on the 21st of November, 1894.

Eve, for the Appellant:—

The question now raised is, whether a contributory of a company in liquidation to whom shares were issued upon special terms, namely, at a discount, can be compelled to pay up the nominal amount of those shares for the purpose of adjusting the rights of the contributories *inter se*, the debts of the company and the costs of the winding-up having been paid. The question was left open by the House of Lords in *Ooregum Gold Mining Company of India* v. *Roper* (1), but some of the observations of Lord *Herschell* in his judgment there are in favour of the Appellant (2). It is not disputed that the Appellant is liable to pay calls for the purpose of paying the debts of the company, and that he has already been ordered to do, and he has not appealed from the order, but has complied with it. But, as regards the adjustment of the rights of the contributories *inter se*, he is entitled to rely upon the contract under which he took the shares as binding between himself and the other contributories. *In re Weymouth and Channel Islands Steam Packet Company* (3) is distinguishable from the present case, because in it there was no clause in the articles of association like clause 140 here. That clause rendered the agreement between *Welton* and

(1) [1892] A. C. 125. (2) [1892] A. C. 143, 144.
(3) [1891] 1 Ch. 66.

the company binding upon the other contributories. It is competent to a company to impose an additional liability upon contributories or classes of contributories: *Lion Mutual Marine Insurance Association* v. *Tucker* (1); *McKewan's Case* (2); *Maxwell's Case* (3). Those cases shew that there is nothing illegal or contrary to public policy in an agreement by contributories that, in the event of a winding up of the company, one class of contributories shall be preferred to another. It has been held, too, that preference shares may be created with a preference in the distribution of assets in the event of a winding-up. In *Ex parte Maude* (4) it was held by the Court of Appeal that shareholders could agree *inter se* to be placed on a different footing, so that losses should be borne, not rateably, but by one class in relief of another. Regard must be had to the liability of the contributories *inter se* at the commencement of the winding-up; payments which they have made during the winding-up are not to be taken into account. In *In re Pioneers of Mashonaland Syndicate* (5) Mr. Justice *Vaughan Williams* acted upon the *dictum* of Lord *Herschell* in the *Ooregum Case* (6).

Renshaw, Q.C., and *Whinney*, for the liquidator, were not called upon.

LORD HALSBURY:—

I wish to keep myself perfectly free to deal with this question if and when it arises elsewhere, when it will be argued under circumstances in which the authorities referred to will not be binding, except so far as *Ooregum Gold Mining Company of India* v. *Roper* applies to the present case. But, sitting in this Court, I am bound by its decisions, and I am unable to distinguish the point now raised from that which was raised and decided in *In re Almada and Tirito Company* (7) and *In re Weymouth and Channel Islands Steam Packet Company* (8). I designedly avoid entering into the argument in the present case, because, as I have already said, I desire to preserve my

(1) 12 Q. B. D. 176.
(2) 6 Ch. D. 447.
(3) Law Rep. 20 Eq. 585.
(4) Ibid. 6 Ch. 51.
(5) [1893] 1 Ch. 731.
(6) [1892] A. C. 125.
(7) 38 Ch. D. 415.
(8) [1891] 1 Ch. 66.

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judgment perfectly free when the case comes, if it ever does come, before the ultimate Court of Appeal for decision. At present it is enough for me to say that I have looked at the three cases which I have mentioned, and, with all respect to Mr. *Eve*, I think the *Weymouth Case* (1) does deal with the very question now before us, and therefore, sitting in this Court, I am bound by that decision. I do not mean to say that I disagree with it; as at present advised, I am inclined to agree with it; but, whether I agree with it or not, sitting in this Court, I am bound by it. The result is that we must affirm the judgment of the learned judge, and dismiss the appeal.

Lindley L.J.:—

I am of the same opinion. I do not think that by any process a share can be issued at a discount so as to render the person to whom it is issued not liable to pay up the amount thereof in full. This cannot be done consistently with the Acts of Parliament. This view of the law has been sanctioned, and has been made the ground for the decision of a great number of cases. Those which have been referred to by Lord *Halsbury* are the most recent and the best known; but if you take them all, adding *Trevor* v. *Whitworth* (2), in which the principle was very carefully discussed in the House of Lords, the result, in my view, is that the thing cannot be done. If it is to be done, the House of Lords must say so.

A. L. Smith L.J.:—

I have nothing to add; I feel myself bound by authority.

Solicitors: *Slaughter & May; C. T. Whinney.*

(1) [1891] 1 Ch. 66. (2) 12 App. Cas. 409.

W. L. C.

In re MIDLAND COAL, COKE, AND IRON COMPANY.

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June 14; *July* 5.
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Nov. 16; *Dec.* 7.

CRAIG'S CLAIM.

[00211 of 1893.]

Company—Winding-up—Scheme of Arrangement—Transfer of Assets and Liabilities to New Company—Proof of Debt—Contingent Liability—Indemnity against Liability under Lease—Joint Stock Companies Arrangement Act, 1870 (33 & 34 *Vict. c.* 104), *s.* 2.

The lessee of certain mines assigned his leases to a company which covenanted to indemnify him against liability thereunder. The company went into liquidation, and a scheme of arrangement under the *Joint Stock Companies Arrangement Act*, 1870, was adopted and approved by the Court for forming a new company which should take over the assets and liabilities of the old company, and should pay or satisfy the unsecured creditors of the old company within three months of the approval of the scheme by the Court. After the new company was incorporated the lessee applied in the liquidation to have a sum provided to meet his contingent liability for rents, royalties, and breaches of covenant:—

Held (affirming the decision of *Wright* J.), that the *Joint Stock Companies Arrangement Act*, 1870, applied to every person having a pecuniary claim against a company, whether actual or contingent, that the lessee was bound by the scheme, and that the application failed.

Per Wright J.: *Semble*, the lessee could compel the new company to indemnify him from time to time as he should be called upon to pay under the leases.

Per the Court of Appeal: Whether, having regard to *Hardy* v. *Fothergill* (1), the lessee would have been entitled, apart from the scheme, to have assets of the old company impounded to meet his contingent liability under the leases, *quære*.

SUMMONS on claim for indemnity in winding-up.

In 1890 *William Young Craig* was the lessee of several coal mines, and by a deed dated the 19th of June, 1890, he assigned his leases to the above-named company, and the company covenanted with him to pay the rents and royalties reserved by the leases, and to perform the lessee's covenants contained therein, and to indemnify *Craig* therefrom. This covenant covered the whole period of the leases, and there was no provision relieving the company from it in the event of the company

(1) 13 App. Cas. 351.

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assigning the leases to any other person. The company took possession and worked the colliery.

On the 26th of May, 1893, a resolution was passed to wind up the company voluntarily.

On the 20th of July, 1893, an order was made to continue the winding-up subject to the supervision of the Court.

On the 13th of September, 1893, a scheme of arrangement under the *Joint Stock Companies Arrangement Act*, 1870, was adopted at meetings of creditors, debenture-holders, and contributories of the company for forming a new company which was to "take over all the assets and business of the existing company, and undertake all its liabilities, including the costs of winding-up" (clause 2); and to pay or satisfy the debentures and unsecured creditors of the old company and the costs of winding-up within three months of the approval of the scheme by the Court (clause 8). It was further provided by the scheme that the new company should allot to each shareholder of the old company upon the nomination of the liquidators of the old company one share in the new company credited with £4 paid for each share held by him in the old company (clause 3). It was further provided that upon payment or satisfaction of the debentures, debts, and expenses, the old company should be wound up and dissolved (clause 10). On the 12th of October, 1893, this scheme was approved by the Court. A new company was formed as proposed, and it was registered on the 30th of November, 1893. On the 5th of December, 1893, an agreement for taking over the assets and business of the old company was entered into between the old company and its liquidators and the new company, and those assets were in fact taken over pursuant to this agreement, but at what precise time did not appear. *Craig* was aware of the proposed scheme, but he did not oppose its approval by the Court, nor did he ever take steps to obtain an injunction to prevent its being carried out. But on the 9th of December, 1893, he applied by summons that a claim by him for £45,787 might be admitted against the old company. Of this debt or liability £336 was in respect of past rents which *Craig* had been compelled to pay and was not disputed. The rest of the claim was based on the covenant by the old company to pay and indemnify him against

the future rents and royalties and liabilities under the leases. The sum claimed in respect of this part of the claim was arrived at by estimating the present value of the rents and royalties and liabilities under the several leases.

The new company was not served with the summons.

The summons was adjourned into Court and heard by Mr. Justice *Wright* on the 14th of June and the 5th of July, 1894.

Kenyon Parker, for the Applicant:—

The Applicant has a contingent claim against the old company, and is entitled to prove for that claim in the winding-up, although a scheme of arrangement has been sanctioned.

Such a claim is provable in bankruptcy: *Bankruptcy Act*, 1883, s. 37, sub-s. 3; *Hardy* v. *Fothergill* (1); and the rules for the time being in force in bankruptcy, as to debts and liabilities provable and future and contingent debts, now apply in the winding-up of companies: *Judicature Act*, 1875, s. 10; *Palmer's* Winding-up Forms (2). Unless the claim is made before the old company is dissolved, the Applicant will be excluded altogether. He cannot be compelled to wait, and sue or prove from time to time in respect of the sums as they are ascertained and become payable under the old company's indemnity, for before all the sums can be ascertained dissolution will have put an end to the old company's liability.

The position of the Applicant is somewhat analogous to that of a lessor where a company in course of winding up is the original lessee. In such a case the liquidator is not allowed to distribute the assets without regard to the lessor's right to future rent: *Gooch* v. *London Banking Association* (3); *Lord Elphinstone* v. *Monkland Iron and Coal Company* (4); *In re Haytor Granite Company* (5).

To prove for the contingent claim is the only method of enforcing the liability. An action cannot be brought against the liquidators to keep the old company alive until the amount provable has been ascertained: *Companies Act*, 1862, ss. 142,

(1) 13 App. Cas. 351.
(2) 2nd Ed. p. 329.
(3) 32 Ch. D. 41.
(4) 11 App. Cas. 332.
(5) Law Rep. 1 Ch. 77.

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143; and an action cannot be brought against the new company because the Applicant is no party to the agreement between it and the liquidators.

It might be contended that the Applicant was not bound by the scheme, because he is in a class by himself, and the separate view of that class was not ascertained under sect. 2 of the *Joint Stock Companies Arrangement Act*, 1870. But assuming the Applicant to be bound by the scheme, he must be entitled to the benefit of it; and to refuse him the right of proving is to deprive him of such benefit.

[WRIGHT J.:—If he is still a creditor, and is a party to the scheme, he must be taken to have agreed that he would look to the new company, and the occasion of valuing his claims should never arise. In substance, there is a novation.]

The contingent liability to the Applicant is one of the liabilities subject to which the new company takes over the assets of the old one under clause 2 of the scheme, and such liability must be satisfied out of the assets.

[WRIGHT J.:—Is the Applicant an unsecured creditor within sect. 2 of the Act of 1870?]

If he is bound by the scheme, he is an unsecured creditor under the 8th clause of it.

[He also referred to *Re British Provident Life and Fire Assurance Company* (1).]

Kirby, for the liquidators:—

The new company has assented to the scheme, and has taken over the assets of the old company on the faith of it. It is part of the scheme that the new company is to pay the debts or indemnify the old company against them.

In the absence of the new company, the Applicant cannot be allowed to prove in order to have his claim valued with a view to proceeding against the new company. The Applicant's position is that as against the old company he cannot prove for the contingent liability after the winding-up has come to an end, a scheme of arrangement has been sanctioned, and the

(1) 4 N. R. 48.

assets of the old company have been handed over to the new company pursuant to the scheme; and as against the new company he can only claim to be paid as the amounts from time to time are ascertained and become payable.

The old company has a right to dissolve itself and transfer its liabilities to a new company, and the Applicant's remedy is only against the latter: *Hort's Case* (1).

There is a contract between the claimant and the new company that the latter will undertake the liability to the extent to which the old company would have been liable if it had not been wound up. It is like the case of debentures to bearer. There may be no contract by the company to pay the debenture-holder, but the company is estopped, by issuing a document in that form, from disputing its liability to the bearer.

[*Kenyon Parker* referred to *Palmer's* Winding-up Forms (2).]

But for the scheme, no doubt the Applicant would be entitled to assess the value of his liability and prove for it.

Kenyon Parker, in reply.

WRIGHT J.:—

This is an extremely puzzling case.

It is difficult to put a meaning on sect. 2 of the *Joint Stock Companies Arrangement Act*, 1870, and the case is complicated by the scheme. But, on the whole, I may take it that sect. 2 is intended to apply to everybody who can be treated as a creditor of any sort, whether actual or contingent. *Craig*, being some sort of a creditor, within the meaning of the Act, so that he could be bound by meetings of creditors, either was bound by some order of the Court, or he had it in his power to get himself protected, and must be treated as if he were a party represented by some particular class of creditors. As one of the creditors, or of a class of creditors, he was a party to and bound by the scheme. Then what is the meaning of the scheme? [His Lordship read clause 2, and continued:—]

That means that the creditors have agreed that the new company shall, in effect, be a continuation of the old one, and

(1) 1 Ch. D. 307. (2) 2nd Ed. p. 372.

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that whatever liabilities, in the widest sense, attach to the old company shall attach in the same manner to the new company —as actual debts if they were actual debts, and as accruing liabilities if they were accruing liabilities against the old company, payable from time to time, as they would have accrued due and payable against the old company. I see nothing to limit the word "liabilities" in paragraph 2 of the scheme.

Clause 8 of the scheme adds to the difficulty. Within three months the new company are to pay in cash or satisfy the unsecured creditors of the old company. *Craig* is not a secured creditor. If he is a creditor at all, he is an unsecured creditor, and at first sight it looks as if he was to be paid in full. But that cannot be the meaning of the clause, because it says that payment is to be made within three months. The term "unsecured creditors" in this clause must mean creditors for moneys which are actually due and payable, not creditors who have merely contingent claims which may or may not ever come to anything.

If that is so, it follows that *Craig* has agreed that his remedy on the covenant for indemnity shall be by calling on the new company to indemnify him from time to time as he is called upon to pay; and they cannot resist that claim, as they are parties to the agreement and to the scheme. I have no doubt that *Craig* could bring actions in his own name against the new company for the amounts as they from time to time become payable. The new company could not dispute its assent to the scheme.

Craig's application therefore fails. I do not think I can do anything to declare his rights against the new company. It is not a party to these proceedings.

But the point before me is a very difficult one, and it is for the benefit of the new company that it should be settled. The costs will therefore be costs in the winding-up of the old company, and the new company will have to pay the costs according to the agreement. But the costs are not to be claimed against the liquidators personally.

F. E.

The Applicant appealed. The appeal was heard on the 16th of November, 1894.

Buckley, Q.C., and *Kenyon Parker*, for the Applicant :—

A company which has taken an assignment of a lease and has contracted to indemnify the lessee against liability on the covenants in the lease, cannot be allowed to denude itself of all its assets. Upon the authorities the Applicant is entitled to have his claim admitted in the liquidation for the full amount of the liability, and to have that sum impounded: *In re Telegraph Construction Company* (1); *Oppenheimer* v. *British and Foreign Exchange and Investment Bank* (2); *Gooch* v. *London Banking Association* (3); *In re Haytor Granite Company* (4); *Horsey's Claim* (5).

Assuming the company to be insolvent, the Applicant might also, by virtue of sect. 10 of the *Judicature Act*, 1875, prove for his claim under sect. 37 of the *Bankruptcy Act*, 1883: *Hardy* v. *Fothergill* (6); but that decision was not intended to overrule the cases above cited.

The scheme is no answer to the claim, because this is a liability which has not been satisfied within the time provided by clause 8. The conditions upon which the scheme was to take effect have, therefore, not been performed.

Kirby, for the liquidators :—

This scheme is sanctioned under sect. 161 of the *Companies Act*, 1862, and sect. 2 of the *Joint Stock Companies Arrangement Act*, 1870. By sect. 161 of the *Companies Act* the liquidators are empowered to sell the assets of a company in liquidation to a new company in consideration of receiving shares in the new company for distribution among the members of the old company; but such shares are not available for the creditors of the old company: *Re Cardiff Coal and Coke Company* (7).

By sect. 2 of the Act of 1870 the creditors are made parties to the scheme and are bound by it.

(1) Law Rep. 10 Eq. 384.
(2) 6 Ch. D. 744.
(3) 32 Ch. D. 41.
(4) Law Rep. 1 Ch. 77.
(5) Ibid. 5 Eq. 561.
(6) 13 App. Cas. 351.
(7) 9 L. T. (N.S.) 186.

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Here the assets have been handed over to the new company with the sanction of the Court, and are beyond recall. The result of the scheme is to substitute the liability of the new company for the liability of the old.

Apart from the scheme, there is an implied promise by every assignee to indemnify the original lessee against breaches of covenant: *Moule* v. *Garrett* (1).

[*Buckley*, Q.C.:—That is only during the continuance of possession.]

The Applicant claims to have assets set apart to meet his liability to his lessor; but the cases cited in support of this view are all cases where the claimant has been the lessor of the company. But a lessee who has assigned his lease to a company stands on a different footing from a lessor. His claim is a contingent claim provable under sect. 158 of the *Companies Act*, 1862, the contingency being the non-performance of the covenants by the company. Assuming that the Applicant has any right against the old company, it is the right to prove, and not the right to have a sum impounded; but, in the first place, as a creditor he is bound by the scheme, and, secondly, there are no longer any available assets to proceed against.

Buckley, in reply:—

The liability of the old company was only to cease upon the happening of certain contingencies, which have not happened. The cases in which a sum has been set aside for future rent apply as well to a lessee who has assigned his lease and taken a covenant of indemnity as to a lessor. For the present purpose they stand in the same position.

A further question arises whether the Applicant is a creditor within the meaning of the Act of 1870.

The word "creditor" in that Act has been held to include secured creditors, but there is no authority for saying that it includes every person having a contingent claim against a company whatever may be the nature of the claim.

(1) Law Rep. 7 Ex. 101.

C. A. 1894 CRAIG'S CLAIM.

1894. Dec. 7. LINDLEY L.J. delivered the judgment of the Court (Lord *Halsbury*, and *Lindley* and *A. L. Smith* L.JJ.). After stating the facts, he proceeded as follows:—

In order to dispose of the various questions raised by the appeal, it will be convenient to consider (1.) Mr. *Craig's* rights against the old company apart from the scheme of arrangement; (2.) the effect of that scheme upon his rights; and (3.) the consequences which follow from the fact that the liquidators of the old company have handed over to the new company all the assets of the old company, and have distributed amongst the shareholders of the old company the shares received from the new company as provided by the scheme.

First, as regards Mr. *Craig's* rights against the old company, apart from the scheme. With respect to that, sect. 158 of the *Companies Act*, 1862, provides: "In the event of any company being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value." Notwithstanding the very comprehensive language of this section, Lord Justice *Giffard*, when Vice-Chancellor, decided in *Horsey's Claim* (1) that, as it was impossible to put a just estimate on the claim of a landlord to future rent and possible breaches of covenant, he was not entitled to prove against a limited company being wound up and to receive a dividend on his proof, and this view prevailed until a comparatively recent date. But after the decision of the House of Lords in the case of *Hardy* v. *Fothergill* (2), which must be considered in connection with sect. 10 of the *Judicature Act*, 1875, it is difficult, if not impossible, to say that Mr. *Craig* could not have had his claim valued and have proved for its value against the old company. Mr. *Craig*, however, does not really want to do this. What he wants is to enter a claim with a view to have assets of the old company set apart for his indemnity before they are divided amongst the share-

(1) Law Rep. 5 Eq. 561. (2) 13 App. Cas. 351.

C. A. 1894 — CRAIG'S CLAIM.

holders; or, if he is not in time for that, he asks that the old company may not be formally dissolved so long as he is exposed to liability under his covenants. He bases his claim in this respect on certain decisions in which a lessor of a limited company being wound up or applying for leave to reduce its capital has been held entitled to enter a claim for the amount of rent and royalties which may become due to him in future, and to an injunction to restrain the company from distributing its assets and dissolving without making proper provision for his payment. The cases in which orders to this effect have been made are: *In re Telegraph Construction Company* (1), *Oppenheimer* v. *British and Foreign Exchange and Investment Bank* (2), *Gooch* v. *London Banking Association* (3), and *Lord Elphinstone* v. *Monkland Iron and Coal Company* (4). The last of these cases was in the House of Lords, and the House made an order in favour of the lessor of a limited company which was being wound up voluntarily, and declared that the lessee company was bound to fulfil its future obligations under its lease, and that the liquidators were bound to make due provision for fulfilling such obligations and to set aside assets of the company in their hands for that purpose. It is true that this was a Scottish case, and a case between lessor and lessee; but we see no reason to suppose that there is any difference between English and Scottish law in this respect. The effect, however, of the decision in *Hardy* v. *Fothergill* (5) on the right of a lessor to have the assets of a limited company which is being wound up impounded has not yet been judicially determined. The English decisions in favour of his right to enter a claim and have assets impounded to meet it have all proceeded upon the view that the lessor could not prove for any ascertainable sum and be paid a dividend upon it, and on some future occasion those decisions will have to be reconsidered. In the present case it is not necessary to solve this new problem, and we say no more about it. We will assume that, apart from the scheme, Mr. *Craig* would have been entitled to enter a claim for indemnity, and to have assets in the hands of the liquidators set apart to answer

(1) Law Rep. 10 Eq. 384.
(2) 6 Ch. D. 744.
(3) 32 Ch. D. 41.
(4) 11 App. Cas. 332.
(5) 13 App. Cas. 351.

this claim before the final dissolution of the company. This was not what Mr. *Craig* asked by his summons; but we pass that over, as the summons might have been amended.

We will now consider the effect of the scheme of arrangement. Mr. *Craig* clearly was entitled to be heard in opposition to that scheme. The cases to which we have referred presuppose the existence of assets not yet distributed amongst the shareholders. Until they are distributed he is entitled to be heard in opposition to any scheme for their distribution. Whether the Court is bound to give effect to his opposition is a different question, and depends on the meaning of the word "creditor" in the *Joint Stock Companies Arrangement Act*, 1870. Considering that that Act was passed in order to enlarge the powers conferred by sect. 159 of the *Companies Act*, 1862, we agree with Mr. Justice *Wright* in thinking that the word "creditor" is used in the Act of 1870 in the widest sense, and that it includes all persons having any pecuniary claims against the company. Any other construction would render the Act practically useless. If we are right in this interpretation of the Act of 1870, Mr. *Craig* is bound by the scheme approved by the Court; and in our opinion he is so bound. This is of itself enough for the decision of this appeal. But we will again assume in his favour that he is not so bound, and that the scheme itself did not deprive him of the rights which we have assumed that he otherwise would have had.

This brings us to the last point—namely, the effect of the approval of the scheme and of what has been done under it. In our judgment Mr. *Craig* has asserted his claim to have assets set aside for his indemnity far too late. He had full notice of the proposed scheme; he did not oppose it; he did not appeal from the order approving it; he took no steps to prevent its being carried out, nor to prevent the shares of the new company from being distributed amongst the shareholders of the old company whilst they were in the hands of the liquidators. The scheme was sanctioned on the 12th of October, 1893. Mr. *Craig* made no application to the Court until the 9th of December, 1893—by which time the new company had been formed. Mr. *Craig* applied for no injunction; and long before the 5th of July, 1894, when his summons came on to be heard, all the assets of the old

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company had been handed over to the new company, and the shares of the new company had been distributed amongst the shareholders of the old company. There were then no assets of the old company to impound, and it was impossible to stay their distribution. We are far from saying that Mr. *Craig* could have done anything effectually after he had allowed the scheme to be approved by the Court without opposing it. Had he opposed it the Court might have refused to sanction the scheme, for the Court is not bound to approve a scheme which it thinks unjust to any one. Be this, however, as it may, it is impossible now to stay any distribution of assets, for there are none to distribute. Although it is not too late to stay the dissolution of the old company, nothing will be gained by so doing now that the assets have all been distributed under the sanction of the Court. The appeal, therefore, must be dismissed with costs.

Solicitors for Applicant: *Bircham & Co.*

Solicitors for the liquidators of the company: *Ashurst, Morris, Crisp & Co.*

H. C. J.

C. A. 1894 Dec. 17.

In re SHORTRIDGE (A PERSON OF UNSOUND MIND).

Lunacy—Person lawfully detained as a Lunatic—Settlement of Stock—Power to appoint New Trustees—Quasi Lunatic Donee of Power—Order authorizing Person to execute Power on behalf of Quasi Lunatic by appointing Two named Persons as New Trustees, and also vesting in them when appointed the Right to call for a Transfer of the Stock—Jurisdiction—Bank of England—"Clean Order"—Lunacy Act, 1890 (53 & 54 *Vict.* c. 5), *s.* 116, *sub-ss.* 1 (*c*), 2, 3; *ss.* 128, 129, 142—*Costs.*

Where a lunatic is donee of a power of appointing new trustees of a settlement, the judge has jurisdiction, under sects. 128 and 129 of the *Lunacy Act*, 1890, to authorize the committee of the lunatic to exercise the power on his behalf by appointing persons named in the order to be new trustees of the settlement; and where the settlement comprises bank annuities the order of the Judge may properly go on to authorize the persons so named, upon their appointment as trustees, to call for a transfer of the bank annuities into their own names, to receive the dividends until transfer, and to hold the stock when transferred upon the trusts of the settlement.

LOUISA JANE SHORTRIDGE was entitled to a life interest under a settlement of Consols dated the 8th of February, 1864,

which provided (*inter alia*) that in case the trustees thereby appointed should die, it should be lawful for her to appoint any other persons to be trustees of the settlement instead of the trustees so dying.

L. J. Shortridge became of unsound mind. She was not so found by inquisition, but she was lawfully detained as a lunatic. The surviving trustee of the settlement died in March, 1892.

By an order made in this matter on the 12th of August, 1893, *Selina Jane Stoyle*, the only next of kin of *L. J. Shortridge*, was appointed to carry out certain directions with regard to her therein contained. By an order made by Mr. *Francis W. Maclean*, Q.C., one of the Masters in Lunacy, and dated the 19th of March, 1894, *Selina Jane Stoyle* was authorized to receive from the trustees of the settlement of February, 1864, to be appointed in pursuance of that order, or other the trustees of the settlement for the time being, the income accrued and to become payable to the said *L. J. Shortridge* under the trusts thereof. Then, after certain directions as to the application of the sums to be received by the said *S. J. Stoyle*, the order provided (so far as is material) as follows:—Paragraph 7: "That the said *S. J. Stoyle* be authorized in the name and on the behalf of the said *L. J. Shortridge* to exercise the power of appointing new trustees vested in the said *L. J. Shortridge* by the said indenture of settlement dated the 8th of February, 1864, by appointing *E. A. Bennett* and *S. Wolferstan* as new trustees of such settlement in place of" (the deceased trustees) "and to do and execute such acts, deeds, and instruments as may be necessary and proper, and as the Masters in Lunacy shall settle and approve of." Paragraph 8: "That upon the appointment of the said *E. A. Bennett* and *S. Wolferstan* as such new trustees as aforesaid they be and are hereby appointed to call for a transfer of and to transfer into their joint names" (the sums of Consols standing in the books of the *Bank of England* in the names of the deceased trustees) "and to receive the dividends accrued and to accrue thereon until such transfer, and that the said stock when transferred be held and applied by them upon and according to the subsisting trusts of the said settlement."

In pursuance of this order, by deed dated the 16th of April,

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1894, and made with the sanction and approval of Master *Maclean*, *S. J. Stoyle* appointed *E. A. Bennett* and *S. Wolferstan* trustees of the settlement of 1864 in the place of the deceased trustees.

The order and the deed of appointment were shortly afterwards brought before the *Bank of England*; but the Bank considered that the order as drawn up was one which they ought not to act upon, and expressed their readiness to give every assistance to the parties in obtaining a decision on the question. Their objections were that the order of the 19th of March, 1894, should not have been a prospective order; that, to carry out the transaction, there should have been two separate orders, the first authorizing *S. J. Stoyle* to exercise the power of appointing the new trustees, and the second, made after the appointment, vesting in the newly-appointed trustees the right to call for a transfer of the stock, so that the Bank might have a "clean order," which they could act upon without being obliged to look into the deed of appointment in order to satisfy themselves as to its validity and due execution.

This was an application to test the validity of these objections, which, in the first instance, came before Lord Justice *Lindley*, and was, upon the request of the Bank, adjourned into Court by his Lordship.

The application was in the form of a motion on behalf of *Selina Jane Stoyle* in the matter of the *quasi* lunatic, to which the *Bank of England* and their solicitors were made Respondents, asking that the order of the 19th of March, 1894, might stand, and be duly passed and entered, and that the *Bank of England* might be ordered to act upon and give full effect to that order, and that provision might be made for the costs of the application.

Rowden, in support of the application:—

The Court had full jurisdiction, under sects. 116 (sub-sect. 3), 128, and 129 of the *Lunacy Act*, 1890, to make the order in this form. Sects. 128 and 129 of the Act of 1890 are in substance identical with sects. 137 and 138 of the Act of 1853. It is clear that the power of appointing new trustees is one of the powers that can be exercised by a committee on behalf of a lunatic: *In re*

Garrod (1). There is in fact no complaint against the substance of this order, and the contention of the Bank that the estate of the lunatic should be put to the expense of two orders instead of one is a mere book-keeping objection put forward for their own convenience. When an order authorizing the transfer of stock follows on as incidental or supplementary to an order authorizing an appointment of new trustees, the Court has never felt in any difficulty in embracing the two things in one order. This was done in *In re Bowmer* (2), where an order precisely similar to the present was made under sects. 137 and 138 of the Act of 1853. Orders in the same form have been frequently made since that case; and the Bank have complete indemnity under sect. 333 of the Act of 1890.

Latham, Q.C., for the Bank:—

I submit that an order in this form is *ultra vires*. Ever since the *Trustee Act*, 1850, it has been the practice of the Bank to call the attention of the Court to any irregularity that may appear to have crept into an order of the Court affecting them; and this practice has been judicially commended as protective of the interests of the public.

There is no jurisdiction in Lunacy enabling the Court to make this order. Sect. 120 of the Act of 1890 enumerates in sub-sections *a* to *k* the various things which the Judge may authorize the committee to do on behalf of the lunatic, and these do not include the exercise of a power of appointment. Then sub-sect. *l*, which is in effect a re-enactment of sect. 136 of the Act of 1853, enacts that the Court may authorize the committee to "exercise any power .... vested in the lunatic for his own benefit." Now, a power to appoint new trustees is not vested in the lunatic for her own benefit. Coming to sect. 129, that section assumes that the order appointing the new trustees has already been properly made, and is not an enabling clause in that behalf, and the only other enabling clause is sect. 128, which merely applies to powers "vested in a lunatic, in the character of trustee or guardian." And the lunatic in this case is neither trustee nor guardian. In truth, this power is neither a beneficial nor a fiduciary

(1) 31 Ch. D. 164. (2) 3 De G. & J. 658.

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power, but a ministerial power; and it is a *casus omissus* from the Act.

[*Rowden*:—In *In re Skeats' Settlement* (1) Mr. Justice *Kay* held that a power to appoint new trustees was a fiduciary power.]

That is no doubt an authority that generally speaking a power to appoint new trustees is a fiduciary power. But assuming that the Court can, under sect. 128, authorize the committee to exercise their power, the order here in question utilizes sect. 129 for dealing with stock which is not the property of the lunatic, although the section only enables the Court to make an order respecting trust property "where it is for the lunatic's benefit." The general power under sect. 129 ought not to be used for making a vesting order of stock: *In re Noyce* (2).

I submit, also, that the vesting order under sect. 129 can only be the order which could have been made under the *Trustee Act*, 1850, or any Act amending that Act, on the appointment of new trustees by the High Court thereunder; whereas the present case is one in which the Court has authorized the exercise of a power contained in a settlement, which is a different thing altogether.

In any case, I submit that there should have been two separate orders in this matter, the first of which should have been in the form of clause 7 of the order actually made. The second order should have been made after *S. J. Stoyle* had exercised the power by executing the deed, and it should have recited the first order and the deed, and then made the vesting order. And this second order alone should have been presented to the Bank, who would thus have had the clean order they are entitled to have.

On behalf of the Bank, however, I am desirous of giving every possible assistance to the Court and to the parties in what is apparently a *casus omissus*, and I suggest that the Court has jurisdiction under the *Trustee Act*, 1893 (56 & 57 Vict. c. 53), ss. 25, 35, to make a clean order.

LORD HALSBURY:—

I am of opinion that this order is correct, and that the objection of the *Bank of England* ought not to prevail. We have the

(1) 42 Ch. D. 522. (2) [1892] 1 Q. B. 642.

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precedent of *In re Bowmer* (1) in 1859, which, when it is looked into and explained, seems to me entirely to embrace this case, because the somewhat hypercritical objection that a power of appointing new trustees is not a power "vested in a lunatic in the character of trustee or guardian" within the meaning of sect. 128 of the *Lunacy Act*, 1890, is abundantly satisfied by the decision of Mr. Justice *Kay* in *In re Skeats' Settlement* (2). That view has also been adopted by the Lords Justices sitting in Lunacy; and, therefore, I think that the 128th section does apply to this case; and it appears to me that the 129th section also applies. The whole theory of the 129th section is that, instead of having to go first to one branch of the Court and then to another, or, as I have heard remarked elsewhere, instead of sending the suitor as a sort of shuttlecock between the battledores of different Courts, the order should be made by one Court. And I think the 129th section was intended in a compendious form to get rid of all the circumlocution, and to get the thing done under one piece of parchment, and to give the power to the Judge in Lunacy to do everything necessary for the benefit of the lunatic, so as not to multiply different steps whereby costs and inconvenience were increased. I think we ought to construe the 129th section as embracing not only the appointment, but everything under it. That is what was intended to be done by this order, and that I think is right.

One point, and one only, has made an impression on me, and that is this. It does not seem unreasonable that where the deed is brought to the Bank it should not be the duty of the Bank clerk to verify the execution of the deed, or the genuineness of the person supposed to execute it, and I think that in future it would be as well that some certificate by the Master should be appended to the deed so as to justify the Bank and assist them in keeping the books correctly. That, however, was not the objection made. In future, if it is thought right, I have no doubt some communication will be made by the Master. For myself, I am satisfied that the order as drawn up is right, and I think the objection ought not to prevail.

(1) 3 De G. & J. 658. (2) 42 Ch. D. 522.

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LINDLEY L.J. :—

I think that, upon the true construction of the material sections of the Act of 1890, the objection that this order is *ultra vires* is untenable. I have no doubt that when sect. 116, which is one of the most beneficial sections, was introduced into the Act, it was foreseen that there would be very great difficulty and expense in making orders under it if parties had to go before both the High Court of Chancery and the Court in Lunacy, and I cannot help thinking that one of the main objects of this section was to invest the Judge in Lunacy with power to make orders in Lunacy appointing new trustees, and that provisions having that object were more or less skilfully incorporated in the Act. I do not know that they are incorporated quite so skilfully as they might have been; but I am satisfied that under sect. 116, sub-sect. 2, and sects. 128 and 129, there is ample power to make the order which is said to be *ultra vires*. That a power of appointing new trustees when vested in a lunatic is a power vested in him in the character of a trustee within the meaning of sect. 128 has been decided more than once. As I understand it, that decision was arrived at in 1859 upon the corresponding sects. 137 and 138 of the *Lunacy Regulation Act*, 1853 (16 & 17 Vict. c. 70), in the case of *In re Bowmer* (1), by one of the most cautious and experienced Judges who ever sat upon the Bench, the Lord Justice *Turner*, a Judge who, as we know, looked after the accuracy of these orders most vigilantly. That case has been followed ever since. We are asked to say that the practice is wrong. I decline to do so.

Moreover, in the case of *In re Blake* (2), referred to in *In re X.* (3), *Cotton* L.J. held, that the Court had power under sect. 137 of the Act of 1853 to authorize a committee to exercise a power to appoint new trustees vested in a lunatic tenant for life. Again, the judgment of Lord Justice *Kay*, then Mr. Justice *Kay*, in the case of *In re Skeats' Settlement* (4), is a clear decision that a power to appoint new trustees is a fiduciary power. I have no doubt about it myself; and when we put that to Mr. *Latham*, and suggested that such a power must come within the

(1) 3 De G. & J. 658.
(2) W. N. (1887) 173.
(3) [1894] 2 Ch. 415, 419.
(4) 42 Ch. D. 522.

terms of sect. 128 of the Act of 1890, he suggested that it was neither fiduciary nor beneficial, but a *tertium quid*—a power vested in the donee in some ministerial character. I am unable to accept that suggestion.

Then it is said that, apart from these considerations, the order is wrong because it is not in two parts. That appears to me not to be supported by any sound reason. Nothing is more common than for orders to be made that upon some event happening some consequence shall follow. So far as that objection goes, I think it is untenable.

No doubt it is desirable for the *Bank of England* to have, what they call, "clean orders." There is some sense in that; and it is desirable that our orders should not be in such a form as to trammel the business of the Bank, who have enormous interests to protect and important duties to discharge. And if they had suggested that they were not satisfied that the particular deed had been executed—if they had raised that point, I cannot help thinking there would have been good sense in it. But, instead of that, they say, "Your order is all wrong," and they want to force the Court to draw up its orders in such a form as they suggest and as suits them. I protest against that. I thank them for pointing out any slip which makes the order wrong; but when the order is right, it is for the Bank to obey it. I will speak to the Master, and suggest what I think will be convenient—namely, that there should be something in the nature of a certificate, which will be better than the letter of the solicitor, to shew that the deed executed is the deed on which the Bank have to act. I think they are entitled to that; but that is not what they wanted. They wanted to put the lunatic's estate to the expense and trouble of getting what they call a clean order. I protest altogether against that. It is the Bank's business to obey the order made by the Court.

A. L. SMITH L.J.:—

I am of opinion that this order is a valid order, and that the objections to it on the ground that it is *ultra vires* are unfounded, for the reasons given by Lord *Halsbury* and Lord Justice *Lindley*.

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I want to add a word about the case of *In re Noyce* (1), in which I took part as one of the Divisional Court. That case has nothing to do with the point argued to-day. There, the Judge of the *Bow* County Court, purporting to act under sect. 133 of the *Lunacy Act*, 1890, had made a vesting order with regard to stock standing in the name of a lunatic. The *Bank of England* objected to that order, and said the county court judge had no power at all to make any such order, because the only powers of the county court judges with regard to the property of lunatics were those given by sect. 132 of the Act, and that outside the matters prescribed in that section the county court judge had no jurisdiction at all as to the property of lunatics. We decided that that was so; and the Court of Appeal upheld us. No point was taken in that case as to the jurisdiction of the Judge in Lunacy under sects. 128 and 129. Although that case was cited as being an authority binding this Court, it has nothing to do with the case we are now deciding.

Rowden then said that sect. 142 of the *Lunacy Act*, 1890, gave the Judge in Lunacy power to order "the costs of and incident to obtaining an order under the provisions of this Act as to vesting orders and carrying the same into effect to be paid out of" the property in respect of which the order was made, "or in such manner as the Judge may think fit"; and he accordingly asked for costs against the Bank.

LORD HALSBURY said that these were not costs of obtaining the order, nor were the Bank hostile litigants, but *amici curiæ*, and the Court must decline to make an order for costs against them. The Applicant's costs would come out of the fund.

Solicitors: *Surr, Gribble & Co.; Freshfields.*

(1) [1892] 1 Q. B. 642.

W. W. K.

SHELFER *v.* CITY OF LONDON ELECTRIC LIGHTING COMPANY.

[1894 S. 840.]

MEUX'S BREWERY COMPANY *v.* CITY OF LONDON ELECTRIC LIGHTING COMPANY.

[1894 M. 610.]

C. A. 1894 KEKEWICH J. *April* 12, 19. C. A. *Nov.* 23, 26; *Dec.* 18.

Nuisance—Statutory Powers—Electric Lighting—Vibration—Noise—Structural Damage—Right of Reversioner to Sue—Injunction—Damages—Electric Lighting Act, 1882 (45 & 46 *Vict. c.* 56), *ss.* 10, 12, *sub-s.* 2, *ss.* 17, 32—*Electric Lighting Act*, 1888 (51 & 52 *Vict. c.* 12)—*Lord Cairns' Act* (21 & 22 *Vict. c.* 27)—*Jurisdiction — Practice — Time for Appealing—Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 15—"*Refusal of an Application.*"

Lord Cairns' Act (21 & 22 Vict. c. 27), in conferring upon Courts of Equity a jurisdiction to award damages instead of an injunction, has not altered the settled principles upon which those Courts interfered by way of injunction; and in cases of continuing actionable nuisance the jurisdiction so conferred ought only to be exercised under very exceptional circumstances.

There is nothing in the *Electric Lighting Act*, 1882, to relieve undertakers thereunder from liability to an action at common law for nuisance to their neighbours caused by their works.

Sect. 10 of the *Electric Lighting Act*, 1882, read together with sect. 32 thereof, is confined to construction of the works required to supply electricity, and does not apply to their subsequent user; and sect. 17 refers to payment of compensation for damages caused by the execution of such works, and not to damages caused by their user when constructed.

An electric lighting company erected powerful engines and other works on land near to a house which was subject to a lease. Owing to excavations for the foundations of the engines, and to vibration and noise from the working of them, structural injury was caused to the house, and annoyance and discomfort to the lessee. The lessee and the reversioners brought separate actions against the company for an injunction and damages in respect of the nuisance and injury thus occasioned.

Kekewich J., after finding on the evidence that the Defendants had created a continuing nuisance as regards the lessee, and had caused structural injury to the house, *held*, that both the lessee and the reversioners were entitled to relief, but, under the circumstances, by way of damages and not of injunction.

The Plaintiffs in both actions appealed against the refusal of the injunction; and the Court of Appeal *held* that there was nothing in either case to

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justify the Court in refusing to aid, by injunction, the legal rights which had been established, and that the appeal must be allowed.

Per A. L. Smith L.J.: It may be stated as a good working rule that damages may be given in substitution for an injunction in cases where there are found in combination the four following requirements, viz., where the injury to the plaintiff's legal rights is (1.) small, (2.) capable of being estimated in money, (3.) can be adequately compensated by a small money payment, and (4.) where the case is one in which it would be oppressive to the defendant to grant an injunction:

By the Court: A judgment or order of the Court refusing part of the relief sought by the plaintiff, and granting other part of such relief, is not "the refusal of an application" within the meaning of Order LVIII., r. 15, so as to cause the time for appealing therefrom to run from the date when the judgment or order was made.

APPEAL from Mr. Justice *Kekewich*.

William Shelfer was the leaseholder and *Meux's Brewery Company* were the reversioners of a public-house more than forty years old, known as the *Waterman's Arms*, situate at *Bankside*, on the River *Thames*. The lease to *Shelfer* (in respect of which a premium had been paid) had been granted by the company in March, 1893, for a term of twenty-one years, at the yearly rent of £70. The premises had formerly been occupied by *Shelfer* as a yearly tenant, and previously to the lease to him they had been put in thorough repair by the company.

The Defendants, the *City of London Electric Lighting Company*, were a company who were incorporated under the *Companies Acts*, 1862 to 1890, and entitled to the benefit and subject to the provisions of the City of *London* Electric Lighting (Brush) Order, 1890, and other orders granted provisionally by the Board of Trade under the *Electric Lighting Acts*, 1882 and 1888, and duly confirmed by Acts of Parliament.

The Defendants, in the end of the year 1891, acquired land adjacent, but not contiguous, to the *Waterman's Arms*, and situate on the western side thereof, and they erected on the land so acquired sheds, engine-houses, a shaft, and all the buildings and machinery necessary for forming a large central station for the purpose of supplying electric light over a considerable area of the metropolis comprised within their limits of supply. Foundations for the works were sunk from twenty-five to thirty feet below the surface of the ground, and engines (some of which

were not more than thirty feet distant from the western wall of the *Waterman's Arms*) of 500 and 1000 horse-power were erected and fixed and commenced to work.

These two actions were brought by *Shelfer* and *Meux's Brewery Company*, claiming injunctions to restrain the Defendants from so working their engines and so carrying on their works at *Bankside* as by reason of vibration or otherwise to cause damage to any part of the premises known as the *Waterman's Arms*, or the structures, fixtures, or fittings thereof, or to interfere with the enjoyment of the premises by the occupier for the purposes of his business as a licensed victualler and innkeeper or otherwise, or so as in any way to cause annoyance or nuisance or danger to such occupier, or the persons inhabiting or frequenting the premises, or so as to cause any injury to the premises or the business carried on upon the same. Damages were claimed in both actions.

From the evidence of witnesses called on behalf of the Plaintiffs it appeared that until October, 1893, the noise and vibration arising from the working of the engines was not noticeable, but that in that month the working of the engines began to cause the rooms, furniture, and bedsteads in the *Waterman's Arms* to vibrate so as to interfere with the sleep, comfort, and health of the occupiers, and two of the witnesses stated that the vibration caused actual sickness. Clouds of steam were also emitted from the Defendants' premises for hours at a time, causing showers of moisture to descend on the premises of the Plaintiffs. A crack also appeared in the wall of the public-house, which in March, 1894, extended through two storeys, and was in some places two inches in width; and a hearthstone in one of the upper rooms became displaced. The house had formerly a settlement or list to the east, but, by reason of the erection of a substantial building on adjacent land about eighteen years ago, and, more recently, by reason of the erection of the Defendants' buildings, the list to the east had ceased, and become converted into a list to the west. Witnesses called by the Plaintiffs attributed the structural damage to the vibration caused by the working of the engines.

There was evidence that the Defendants were producing electricity by means of engines of from 4000 to 5000 horse-power,

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and that, unless restrained from so doing, they were about to increase their engine power to not less than 20,000 horse-power.

The Defendants admitted that some noise arose from their exhaust-pipes, but undertook to take all reasonable means to abate it, and it was proved that they had works in course of construction which would effect that object. As to the vibration, they adduced evidence tending to shew that it was of a trivial character. The existence of the crack in the wall was not denied, but there was evidence tending to shew that the structural injury to the Plaintiffs' premises was owing to subsidence arising from the abstraction of water consequent on the digging of the foundations for the engines in moist soil.

It was not shewn that the Plaintiff *Shelfer* had suffered any direct pecuniary loss, or that the business of a licensed victualler carried on by him at the *Waterman's Arms* had fallen off by reason of the acts of the Defendants.

There was evidence that the Defendants had carried out their works in the best possible manner, and there was no evidence of negligence on their part. It was stated that six miles and a half of the principal thoroughfares in the City of *London* were lighted with arc lights, the current for which was generated at the Defendants' works; that the main thoroughfares in the City were lighted exclusively with arc lamps, and the gas standards were being removed; and that the electric light was being supplied to the *Royal Exchange, Bank of England, Mansion House* and *Guildhall*, and other public buildings, and to the offices of 1500 firms in the City.

Sect. 82 of the City of *London* Electric Lighting (Brush) Order, 1890, confirmed by the *Electric Lighting Orders Confirmation* (*No.* 15) *Act*, 1890 (53 & 54 Vict. c. ccxxxix.), is as follows: "Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused by them."

The actions came on for hearing before Mr. Justice *Kekewich* on the 12th of April, 1894.

Warmington, Q.C. (*Waggett*, with him), for *Shelfer*, and (*Badcock*, with him) for *Meux's Brewery Company*, submitted that

cases of nuisance by vibration and noise and structural injury by subsidence had been shewn, which entitled the Plaintiffs as occupiers and owners to an injunction and damages; and that as sect. 82 of the Provisional Order under which the undertaking of the Defendants was constituted expressly preserved their liability for nuisance, they were precluded from raising any defence on the ground that they were acting under the authority of statute. [They referred to *Rapier* v. *London Tramways Company* (1) and *Metropolitan Asylum District* v. *Hill* (2).]

Moulton, Q.C., *Renshaw*, Q.C., and *W. C. Braithwaite*, for the Defendants:—

So far as the action is grounded on injury caused by subsidence it is clearly not maintainable, quite irrespectively of the statutory powers of the company. If there has been subsidence at all, the evidence goes to shew that it must have arisen from the abstraction of water, owing to the excavations made by the Defendants. There is no right of action for diminution of support by abstraction of subterranean water: *Popplewell* v. *Hodkinson* (3). The Plaintiffs cannot have any claim on the ground of easement, for the evidence as to the change of the position of the house shews that they could not have begun to acquire an easement until a few years ago, when the list to the east ceased.

As regards vibration, it has not been proved to exist, and, even if it does exist, it has not been shewn that the Plaintiff *Shelfer* has suffered any pecuniary loss by reason of it.

Meux's Brewery Company, being merely reversioners, cannot maintain their action either on the ground of nuisance or of injury by subsidence. As reversioners they are *primâ facie* protected by the covenant of their lessee, and the authorities are clear that a reversioner cannot maintain an action for injury unless he shews that the injury of which he complains is of such a permanent character that it must necessarily affect his own interest when it falls into possession—that is to say, that he must of necessity find the nuisance then existing

(1) [1893] 2 Ch. 588. (2) 6 App. Cas. 193.
(3) Law Rep. 4 Ex. 248.

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and affecting his interest as an interest *in præsenti*: *Jones* v. *Chappell* (1); *Mott* v. *Shoolbred* (2); *Simpson* v. *Savage* (3); *Mumford* v. *Oxford, Worcester, and Wolverhampton Railway Company* (4); *Cooper* v. *Crabtree* (5); *Rust* v. *Victoria Graving Dock Company* (6). In this case the nuisance complained of arises from the foundations which the Defendants have put in for their permanent engines. It cannot be assumed that that nuisance will exist when the reversion of *Meux's Brewery* falls into possession. New discoveries may have been made for the prevention of vibration, or for the supply of electricity by other means.

The nuisance complained of, if any exists, was committed by the Defendants in the exercise of their statutory powers, and everything that they have done is authorized by the *Electric Lighting Act*, 1882, under which their powers are derived. By sect. 10 of that Act the undertakers for the purpose of supplying electricity are empowered to construct such works and do all such things as are necessary and incidental to such supply. By sect. 12, sub-sect. 2, of the same Act (7), they are invested with all the powers of breaking up streets conferred on gas companies by the *Gasworks Clauses Act*, 1847; but the clause which prohibits gas companies from creating a nuisance by their works is omitted. By sect. 17 of the Act (8) provision is made for full compensation

(1) Law Rep. 20 Eq. 539, 543.

(2) Ibid. 22.

(3) 1 C. B. (N.S.) 347; 26 L. J. (C. P.) 50.

(4) 1 H. & N. 34; 25 L. J. (Ex.) 265.

(5) 19 Ch. D. 193; 20 Ch. D. 589.

(6) 36 Ch. D. 113, 132.

(7) Sect. 12, sub-sect. 2, of the *Electric Lighting Act*, 1882 (45 & 46 Vict. c. 56), provides as follows:—

"12. The provisions of the following Acts shall be incorporated with this Act; that is to say, . . .

"(2.) The provisions of the *Gasworks Clauses Act*, 1847, with respect to breaking up streets for the purpose of laying pipes, and with respect to waste or misuse of the gas or injury to the pipes and other works, except so much thereof as relates to the use of any burner other than such as has been provided or approved of by the undertakers."

(8) Sect. 17 of the *Electric Lighting Act*, 1882 (45 & 46 Vict. c. 56), is as follows:—

"In the exercise of the powers in relation to the execution of works given them under this Act, or any license, order, or special Act, the undertakers shall cause as little detriment and inconvenience and do as little damage as may be, and shall make full compensation to all bodies and persons interested for all damage

to all persons injured by the exercise of the statutory powers, and the existence of so wide a compensation clause indicates the intention of the Legislature that the undertakers should be empowered to do acts which are actionable. The provision contained in sect. 82 of the Provisional Order of 1890 does not in any way lessen the rights conferred by the general Act of 1882. To produce such a result, an express provision in the special Act confirming the Provisional Order would have been required, and there is no such provision. Therefore, the powers of the company under the general Act of 1882 are unaffected by sect. 82 of the Provisional Order, which must be read as referring solely to the powers conferred by that order, and not to those conferred by the general Act. That section cannot be construed literally, for it would be impossible for this company to lay down a yard of rail in a street for the purpose of supplying electricity without being liable for a nuisance. The section must, therefore, mean that none of the specific provisions of the Provisional Order shall be deemed to extend the privileges conferred by the Act so as to protect the undertakers from liability for nuisance. Under the general Act the undertakers, it is submitted, are bound to give compensation, but are not liable for damage done by the execution of their works; and whatever injury was done in this case was done by the Defendants in the execution of their works, and is matter for compensation under the general Act. The company have powers of grave obligation to be exercised for the benefit of the public, and their position is entirely analogous to that of railway companies. If there were no such statutory protection, the company could not supply electricity at all. They have to send along the street a current of immense pressure, and to do acts producing results which it may be beyond their power to control. *National Telephone*

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sustained by them by reason or in consequence of the exercise of such powers, the amount and application of such compensation in case of difference to be determined by arbitration."

Sect. 32 provides as follows:—"In this Act, unless the context otherwise requires. . . . The expression 'works' means and includes electric lines, also any buildings, machinery, engines, works, matters, or things of whatever description required to supply electricity and to carry into effect the object of the undertakers under this Act. . . ."

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Company v. *Baker* (1), the case of the Electric Tramway Company, is a direct authority in our favour. The Defendants have executed all their works in the best possible manner for the purpose authorized by statute; there is no evidence that they have been guilty of negligence; and therefore the right to compensation given by the statute is the only right of the Plaintiffs, and the action is not maintainable.

In any view of the case, the Court, on the materials before it, ought not to grant an injunction to restrain a work which is for the benefit of the whole City of *London*, in which many of the main streets and public buildings would be left in darkness if the company's works were stopped. Upon the whole case, it is submitted that the utmost relief which the Court can give must be by way of damages.

KEKEWICH J.:—

It will be convenient for me to dispose of one point at once. The point made by the Defendants is that they are not liable to a common law action of nuisance. On that point I am against them, and do not think it necessary to call on the Plaintiffs. I speak of them collectively, because I am not now distinguishing between the reversioners and the tenant in possession, or intimating any opinion on the question whether the reversioners have any title to maintain an action at all. Nor am I now dealing with any injury to the building caused by the construction of the foundations of these engines, but only with the question whether, assuming that there is noise and vibration affecting the *Waterman's Arms*, found to be the result of the Defendant's operations as now conducted, the Defendants are liable to an action on the score of nuisance. It is urged that they have done their very best to carry on their works in a proper manner, and, therefore, cannot be charged with negligence. That is my view of the evidence, and has been throughout, except as to the noise caused by the exhaust-pipe. As to that, I have no doubt that some part of the complaint is properly raised. But as regards that the Defendants have not only offered here whatever is reasonable to abate any nuisance thereby occasioned, but it is

(1) [1893] 2 Ch. 186.

proved that they have in process of construction works which will abate the nuisance, and I cannot do more on that point than give merely nominal damages.

The question is, however, assuming the existence of nuisance caused by the exhaust-pipes or by the vibration arising from the working of the engines, are the Defendants liable in law either to an injunction or in damages substantial or nominal? In my opinion, there is nothing to relieve them from the common law liability to an action for nuisance. Mr. *Moulton* did not rely on the Provisional Order, confirmed by Act of Parliament, which constitutes the Defendants' immediate title. The Provisional Order is for all purposes equivalent to an Act of Parliament; it is confirmed by an Act of Parliament, which recites that the Provisional Order has no validity or force until confirmed by Act of Parliament, and then confirms it, and all the provisions thereof, in manner and form as set out in the schedule to the order. The result is that we have here in a convenient form, according to the legislative view at the present day, the charter of the company, depending, no doubt, on an earlier charter, to which I will refer directly. That is their constitution. The order provides (*inter alia*) that the company shall be subject to certain liabilities, and shall and may do certain things, and it provides also for the rights of consumers, and prescribes other safeguards for the supply of electricity within a particular area; and then sect. 82 says: "Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them." Mr. *Moulton* accepts the view that "nothing in this order" means what it says, and does not mean "nothing in this order or in any other preceding Act." With that I entirely agree. That which the Defendants are doing, and is complained of here, is not what comes within the order, but what comes within the general Act of 1882. Is there anything in that Act to relieve the Defendant company from liability for nuisance? The general law is perfectly plain, and there is no occasion to refer to the numerous cases in which it has been discussed and decided. It is well settled that power to do a particular thing—as, for instance, to construct a railway—does

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not justify the undertakers (to use the general word) in doing that thing so as to commit a nuisance, unless by express language or by necessary implication that is stated or must be inferred. There are many cases in which that proposition is to be found. In the case of the *National Telephone Company* v. *Baker* (1), to which Mr. *Moulton* referred, I thought that the *Leeds Tramway Company* had power to do what must be necessarily an injury to their neighbours, the telephone company. On the other hand, we are familiar with many cases in which that plea has been of no value at all. I cite one, not by name, as an instance, because I think it illustrates another point which is of importance here. Railway companies are continually made, or attempted to be made, liable for damages done by sparks falling from their engines and setting fire to grass and other things. Now, they are entitled to run engines; they are not only entitled, but may be bound to use the railway and use steam power in so doing; but the question always is whether they are doing it reasonably. If they are not doing it reasonably, if they are not taking all possible precautions, they are liable to an action at common law, and not liable for compensation, because the Act of Parliament does not say—neither the general nor the special Act—that they are to be free from the liability to an action (2). The reason why I refer to this particular class of instances is that there is always a distinction to be made between the construction of the railway and the execution of their powers, and that distinction occurs to me as worthy of notice here.

Then, turning to the *Electric Lighting Act* of 1882, Mr. *Moulton* relies on three general points of view. In the first place, he says that the company are authorized, and may be regarded as bound, to supply electricity for the lighting of parts of *London* within a certain area. There is nothing, according to the general principle to which I have referred, in such an obligation which can relieve them from liability for a nuisance. The Act does not say in so many words that they may or shall do that, notwithstanding that in so doing they create a nuisance to their neighbours, nor do I see the slightest ground for saying that

(1) [1893] 2 Ch. 186.

(2) See *Smith* v. *London and South Western Railway Company*, Law Rep. 6 C. P. 14, in Ex. Ch.

this is a necessary implication. Unless Parliament has declared otherwise, the undertakers remain liable.

Then Mr. *Moulton* relies on certain powers, including more particularly one mentioned in sub-sect. 2 of sect. 12, in respect of the breaking up of streets. The company are empowered to do certain things—powers to do which are also given by the *Gasworks Clauses Act*, 1847. It is quite possible that anything which is necessary, that is to say reasonably necessary, following from that may be done, notwithstanding that some nuisance may also be consequent on it. That may or may not be so. If it is so, which is the strongest view on behalf of the company, it seems to me to follow that other nuisances are not allowed. The express allowance of one nuisance would go far to shew that no other was permissible; but it cannot go to shew that any other is permissible.

Then Mr. *Moulton* relies on sect. 17, which places the company as undertakers under an obligation, first, to cause as little detriment and inconvenience, and do as little damage as may be; and, secondly, to make full compensation to all bodies and persons interested for all damage sustained by them by reason or in consequence of the exercise of such powers. He says the result is, that if the Plaintiffs have any cause to complain under this head as well as others (I am not dealing with the others), they must seek compensation and nothing more, and cannot bring an action for a common law nuisance. I see nothing in the words I have read which justifies any such conclusion when I read them, as I conceive I am bound to do, according to the general principle to which I have already referred. But, beyond that, I find the section is introduced by and limited by the words, "In the exercise of the powers in relation to the execution of works given them under this Act, or any license, order, or special Act." Now, what are the "works"? They are defined by sect. 32 of this Act. [His Lordship read the definition of the expression "works" contained in sect. 32, and continued:—] The works there are set out at length, but they are all governed by the description of works "required to supply electricity," and the supply itself is not included. It would be foreign to the definition to include the supply itself. It seems

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to me, therefore, that when the complaint is made, not of the erection of the engines, but of the working of them so as to make the supply, the case does not fall within the 17th section, and that this is not a case of the execution of the works, but only of the use of the works when executed. That distinction has been drawn over and over again in construing the *Railway Acts*, under which it has been held that, though a man can recover compensation because his house is injuriously affected by the construction of the railway, he can get no compensation for the damage, which may be great or greater, and which continually occurs, by vibration caused by the trains passing through a tunnel, as on the *Metropolitan Railway*. That is not a case of the execution of the works, but of the running of the trains—the use of the works when executed. That point seems to me to be one of considerable importance; but yet I do not desire to base my decision on that alone; I think it quite sufficient, and quite sound, to base it upon the other view that, unless there is found an express relief from the ordinary liability of the subject, whether a company or an individual, to an action at common law for nuisance, that liability remains, and the Court cannot restrict the relief to compensation unless it can see that the compensation itself, on a fair construction, covers the relief which is contended for. If the Legislature had thought fit to say, "If the company commit a nuisance, then compensation shall be made to the persons affected thereby," then, without in so many words legalizing the nuisance, the language would go a long way to shew that to be the reasonable result. I see nothing here to shew that compensation for a nuisance in working was contemplated, and, if it was not, the argument on the section falls to the ground. On these grounds I think the company have entirely failed to exempt themselves from liability to an action for nuisance in working their engines and electrical appliances for the supply of electricity within their defined area. On the rest of the case I must hear you, Mr. *Warmington*.

Warmington, in reply:—

It is enough for the Plaintiffs to shew that they suffer injury from something which occurs on the Defendants' premises. It

is not incumbent on them to state exactly the particular occurrences or acts which occasion the injury: *Rapier* v. *London Tramways Company* (1). The Plaintiffs are the owners of a house which has existed for over forty years, and they are entitled to an easement of support. The Defendants are obliged to admit the existence of the crack, and that is a very serious injury to the structure. It is for them to prove their case as to subterranean water; but their proposition of law on that point is a great deal too broad. *Popplewell* v. *Hodkinson* (2) may be an authority in their favour as regards natural support, but has nothing to do with easement or grant, and here we rely on easement. In *Rigby* v. *Bennett* (3) the plaintiff was held entitled to an injunction to restrain the defendant from excavating so as to interfere with the plaintiff's right of support.

As regards the right of the reversioners to sue, I agree that the injury must be of a permanent character; but the word "permanent," as used in *Simpson* v. *Savage* (4) and other authorities, refers to something which is not accidental or occasional. Here the acts of the Defendants are permanent. Under their Act of Parliament they are bound permanently to supply the public with electricity, and what they are doing is incident to that duty and business. That which is daily recurrent is permanent. A reversioner can bring an action for fouling a stream, and has a right of action for all nuisances which affect his land. If the Defendants could shew continuous user, the reversioners, when their interest came into possession, might be debarred from obtaining an injunction: see *Crossley* v. *Lightowler* (5).

Renshaw:—

Rigby v. *Bennett* is not in point. It turned on implied grant; the plaintiff and defendant were grantees from a common owner, and the Court of Appeal held that there was nothing in the circumstances to take away the implied right to support from the adjoining lands of the grantor.

Cur. adv. vult.

(1) [1893] 2 Ch. 588.
(2) Law Rep. 4 Ex. 248.
(3) 21 Ch. D. 559.
(4) 1 C. B. (N.S.) 347; 26 L. J. (C.P.) 50.
(5) Law Rep. 3 Eq. 279; 2 Ch. 478.

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1894. April 19. KEKEWICH J. (His Lordship held, upon the evidence, that the acts of the Defendants constituted a nuisance, and had damaged the Plaintiffs' premises so as to make them less comfortable, to injure the structure, and decrease the value; but that as to the Plaintiff *Shelfer*, having regard to the fact that the profits of his business had not been interfered with, and to the character of the nuisance, and to the great inconvenience that would be caused by stopping the business of the Defendants, damages were a fair compensation, and no injunction ought to be granted (1). His Lordship then proceeded as follows):—

Now, as regards the Plaintiffs, *Meux's Brewery Company*, of course, after what I have said about the Plaintiff *Shelfer*, I shall not think of granting them any injunction; but I must deal with this point as regards their case. They are obviously not entitled to an injunction as regards the structure, because that is a thing of the past; but as regards the noise and vibration, it seems to me that the cases which have been cited and the principles of law are conclusive against the granting of an injunction. There is nothing here of a necessarily permanent character. They have no reversionary interest in what may happen some nineteen years hence, and on these authorities they cannot have an injunction to restrain what may be impossible at that time. Then, are they entitled to any relief at all? None, I think, in respect of the noise, either by the steam or by the engines, or by the vibration from either cause. That really depends on the same principle of law. But it may be disposed of perhaps on more practical grounds. It is no disadvantage to them. Their lease is good, and their rent is well secured. They have no ground of complaint because their tenant is in an unfortunate position, even if they were good enough, which there seems to be no reason for their doing, to let him off some part of his rent. That would be a mere act of grace on their part, and they cannot have damages for any loss which does not follow from legal right. But as regards the structure, it seems to me their position is somewhat different. This is an old house, it is true, but it was put in order some years ago, and is a house for which they seemed to

(1) See the words of the judgment as referred to by *A. L. Smith*, L.J., p. 321, below.

have no difficulty in finding a tenant—a house which is doing a good business, and is likely to do a good business for some time to come, and that house has been damaged. They are now entitled in reversion to a house which is less substantial than it was, and which, according to the evidence, will, by reason of the damage done to it, be less substantial at the expiration of the present tenancy. That seems to me to give a cause of action for damage. It is impossible for me to say how much. I should guess that a small sum comparatively would compensate them; but I cannot see my way to saying that they are not good Plaintiffs. The case cited on this point is *Popplewell* v. *Hodkinson* (1); but, as was pointed out by Mr. *Warmington*, that case does not depend on grant. Here I have a case of grant—that is to say, I have a case of a statutory right by prescription equivalent to grant; and if the Defendants, being the adjoining owners, have deprived *Meux's Brewery Company* of their support, the brewery company can sue them on that ground, notwithstanding, as it seems to me, that they have withdrawn that support by withdrawing the water in the soil. There is no right of action against them for withdrawing the water, which is only percolating through the soil, and does not run through a definite channel. *Meux's Brewery Company* could not claim on that ground. But, if by reason of doing that which is lawful, that is to say, withdrawing the water, the Defendants have done that which is unlawful, withdrawn the support, then the right of action seems to follow. To that Mr. *Renshaw* answers that there was no right of support, and for this reason: It is in evidence, and I think must be taken to be proved, that the Plaintiffs' house at first settled or listed to the east; then about eighteen years ago a large, substantial building was built on the east, and probably for that reason, or perhaps because the settlement had completed itself, as settlements do, the list to the east ceased, and now, by reason perhaps to some extent of the great weight and solidity of the Defendants' premises, but also to some extent certainly by reason of these deep foundations of the engines going down into the moist soil, what was a list to the east has been converted into a list to the west, with the result

(1) Law Rep. 4 Ex. 248.

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shewn in the evidence as to the crack and the splitting of the hearthstone. Mr. *Renshaw* says there was no support before; the position has been entirely altered; the Plaintiffs are now claiming in respect of that which they had not forty years ago, but only a few years ago. I do not understand the right to support to depend entirely on the exact position of the two adjoining buildings—or rather lands—because they are lands whether covered with buildings or not. The right to support is, I apprehend, enjoyed even though the support is of little practical use. The right to support comes from the adjacency, and not from the fact that support is actually given continuously. Be that as it may, though the list was to the east, it is impossible to say that this old house was not kept up by the lands and buildings on the west. No one has dared to say that, if there had not been the support on that side, the house would not have settled that way. I take it for granted that it would have done so, and that the support has been there to the house as it now stands, though the inclination of some of the walls has been altered. That defence not prevailing, I think the Defendants are liable to *Meux's Brewery Company* on that ground, but on that ground only. I am afraid that matter of damages must also be inquired into. I am not sure that it is great, and I would more willingly have settled the question to get rid of the whole action; but, unfortunately, I do not see my way. I must, therefore, grant an inquiry as to the damages occasioned to the Plaintiffs, *Meux's Brewery Company*, by the structural alteration of the house, "caused by the Defendants' operations." Those words must be inserted in the inquiry. The subsequent costs must be reserved so that I may see whether there is anything serious in the matter. So far as the action seeks for an injunction, I think it must be dismissed with costs. I do not say anything about the general costs of the action, but I dismiss it with costs so far as it asks for an injunction, and I give the Plaintiffs, *Meux's Brewery Company*, the costs so far as it asks for damages, and I reserve subsequent costs. The other Plaintiff has substantially succeeded in his whole case, and he must have the whole costs of his action.

C. C. M. D.

The Plaintiffs in both actions appealed against this decision so far as it refused the injunctions claimed therein. The appeals came on for hearing on the 23rd of November, 1894.

The appeal of *William Shelfer*, the lessee was argued first.

Warmington, Q.C., and *Badcock* (*Waggett*, with them) for the Plaintiff *Shelfer*:—

The nuisance is established; the Defendants have not proved that it cannot be prevented, and upon the findings of the learned Judge the Plaintiff is entitled to an injunction. It is true that under *Lord Cairns' Act* (21 & 22 Vict. c. 27) the Court has jurisdiction to award damages instead of an injunction; but, except where the plaintiff has disentitled himself to the injunction by his personal conduct, as by *laches*, in all the cases in the books since the passing of the Act in 1858, and from *Isenberg* v. *East India House Estate Company* (1) down to *Martin* v. *Price* (2), where damages have, against the will of the plaintiff, been awarded in lieu of an injunction, the injunction sought for has been mandatory. The number of such cases is fourteen, and although *Lord Cairns' Act* is not in terms confined to mandatory injunctions, yet the discretion conferred by the Act will only be exercised in accordance with the established practice of the Court.

[They were stopped by the Court.]

Moulton, Q.C., and *Renshaw*, Q.C. (*W. C. Braithwaite*, with them), for the Defendants:—

The Court below having exercised its discretion by giving damages instead of an injunction, this Court ought not to review that decision.

[LINDLEY L.J.:—Is not the rule laid down by the House of Lords in *Imperial Gas Light and Coke Company* v. *Broadbent* (3)?]

That decision was before *Lord Cairns' Act* (21 & 22 Vict. c. 27), the 2nd section of which conferred upon the Court of Chancery a jurisdiction, which it did not previously possess, of awarding damages in substitution for an injunction "in all cases" in

(1) 3 D. J. & S. 263. (2) [1894] 1 Ch. 276.
(3) 7 H. L. C. 600.

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which it had jurisdiction to grant an injunction "against the commission or continuance of any wrongful Act." Now, the Respondents do not object to paying damages or compensation, but they strongly object to an injunction, which, if it did not put a stop to their business, would seriously hamper them in the performance of their duties.

They have done their best to carry on their works in a proper manner; they are doing all they can to abate any nuisance; and they are entitled to resist the injunction by every means in their power. The cases relied on by the Plaintiff are light and air cases; but the obstruction of light and air stands on a different footing from nuisance, and the Court will be more inclined to regard damages as a sufficient remedy in the latter case: *Viscountess Gort* v. *Clark* (1).

[*Warmington*, Q.C.:—There the appeal was the defendant's, the plaintiff making no complaint of the order directing an inquiry as to damages.]

[LORD HALSBURY:—That case does not raise the question.]

In *Holland* v. *Worley* (2) damages were awarded in lieu of an injunction for threatened injuries.

[LINDLEY L.J.:—The practice is laid down by Lord *Cranworth* in *Stokes* v. *City Offices Company* (3).]

The Defendants were justified in what they have done by their statutory powers and authorities, and they rely upon them for protection. This argument goes also to the question of damages.

The *Electric Lighting Act* contemplates that a nuisance may arise and provides compensation. The effect of that Act and of the Provisional Order is to impose upon the Defendants the duty of supplying a large and densely populated district with electricity for ever, subject to the right of the municipality to purchase the undertaking in forty-two years. By sect. 6 of the Provisional Order the undertakers are prohibited from constructing works outside the area of supply; it follows that the generating stations must be within the specified area; but it is notorious

(1) 16 W. R. 569. (2) 26 Ch. D. 578.
(3) 13 L. T. (N.S.) 81.

that every available spot within such area is surrounded with houses, and if an injunction is granted the Defendants may be prevented from carrying on their works. A difficulty arises from sect. 82 of the order, which provides that "nothing in this order" shall exempt the undertakers from proceedings for nuisance. The Provisional Order does not give any special immunity to the undertakers; but, on the other hand, the order is subject to the Act of 1882, and it does not override any immunity derived from the general Act. Sect. 82 was a general clause inserted, it may be, *ex abundanti cautelâ*, to guard against the special company being put into a more favourable position against the public than was provided by the general Act. The Provisional Order does not say that a nuisance shall not be committed. The power to commit the nuisance complained of in this case is necessarily implied from the provisions of the general Act, and is independent of the Provisional Order. We have an ever-increasing duty to perform in supplying electricity, and the Legislature must be presumed to have given us the powers necessary for the performance of our duty. This case falls within the principle of *London, Brighton, and South Coast Railway Company* v. *Truman* (1) and *National Telephone Company* v. *Baker* (2).

[They also urged upon the Court the same arguments as they had addressed to the Court below upon the obligation on the Defendants to exercise their powers for the benefit of the public, and the analogy of their position to that of a railway company.]

Warmington, Q.C., was only called upon for a reply as to the construction of the *Electric Lighting Act*, 1882:—

The powers conferred by the Act of 1882 are subject to the conditions imposed upon the undertakers by the Provisional Order of 1890, which has the force of an Act of Parliament; and, by the 82nd clause of that order, nothing therein is to "exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused by them." This condition puts the undertakers in precisely the same position as any other of Her Majesty's subjects. [He

(1) 11 App. Cas. 45. (2) [1893] 2 Ch. 186.

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referred to *Attorney-General* v. *Gaslight and Coke Company* (1); *Attorney-General* v. *Leeds Corporation* (2); *Metropolitan Asylum District* v. *Hill* (3); *London, Brighton, and South Coast Railway Company* v. *Truman* (4); and *Bower* and *Webb* on Electric Lighting.]

The appeal in *Meux's Brewery Company, Limited* v. *City of London Electric Lighting Company* was then opened.

Warmington, Q.C., *Badcock*, and *Waggett* for the Appellants.

Renshaw, Q.C. (with him *Moulton*, Q.C., and *W. C. Braithwaite*) for the Respondents:—

We take the preliminary objection that this appeal is out of time. The order of Mr. Justice *Kekewich* was made on the 19th of April, but notice of appeal was not given until the 23rd of October, 1894. This is a "case of the refusal of an application," and by Order LVIII., rule 15, the three months within which (except by special leave) an appeal must be brought is to be calculated "from the date of such refusal." The hearing of an action is an "application" within the meaning of this rule: *International Financial Society* v. *City of Moscow Gas Company* (5).

[LORD HALSBURY:—According to *Jones* v. *Andrews* (6) the different claims of the Plaintiffs are clearly separable. They failed as to the injunction. They succeeded in getting damages for structural injury.]

It makes no difference that several claims are joined in one application and only some of them are refused: *Trail* v. *Jackson* (7). The reason of this is that when an application is refused the plaintiff who intends to appeal knows quite well what he is appealing against from the moment of the refusal: *Swindell* v. *Birmingham Syndicate* (8).

Warmington, Q.C., *Badcock*, and *Waggett* were not called upon.

(1) 7 Ch. D. 217.
(2) Law Rep. 5 Ch. 583.
(3) 6 App. Cas. 193.
(4) 11 App. Cas. 45.
(5) 7 Ch. D. 241.
(6) 58 L. T. (N.S.) 601.
(7) 4 Ch. D. 7.
(8) 3 Ch. D. 127, 133.

LORD HALSBURY:—

To my mind this case comes distinctly within the principle pointed out by Sir *George Jessel*, M.R., in the case of *Berdan* v. *Birmingham Small Arms and Metal Company* (1), where he says, if the application "is refused the applicant knows the fact from the time when it is disposed of by the Judge, and the time allowed for an appeal runs from that time. If it is granted, but in a form not satisfactory to the applicant, it is only reasonable that he should know the precise terms of the order before he determines whether he will appeal." To my mind there is here one cause of action. It is true there is an alternative or cumulative remedy asked for by the Plaintiffs. Having succeeded in getting one of the remedies, I think it is only reasonable they should wait to see the exact form of the order drawn up before they make their appeal. I think it would be open to very serious inconvenience if it were supposed that where there is what I may call a compound order refusing part of the relief and giving another part, the litigant must immediately make up his mind whether he will appeal or not. When he looks at the real form of the order he might acquiesce in it or he might think it right to appeal; and it is proper that he should have a reasonable time, when he has the exact order made by the Court, to make up his mind whether he will appeal or not.

LINDLEY L.J.:—

I think we must take a practical view of this limit as to time. If a man knows exactly what he has to appeal from he does not want to see the order; but where, as here, he has partly succeeded and partly failed, and where the costs are set off, one set against another, it is only reasonable that before appealing he should wait to see the order as drawn up. The order may be so simple that the appellant does not want to see it. Every case turns upon, whether it is reasonable to stop and see what the order is. I think in this case it was eminently reasonable that the Plaintiffs should do so.

(1) 7 Ch. D. 24, 25.

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A. L. SMITH L.J.:—

I am of the same opinion, and I think our decision is in accordance with the decision given by this Court in *Jones* v. *Andrews* (1).

The hearing of the appeal was then continued.

Warmington, Q.C., *Badcock*, and *Waggett*, for the Appellants:—

The reversioners had damages given to them in the Court below, only for structural injuries which could be seen; but they have had no relief in respect of the permanent depreciation of their property. They are entitled to an immediate injunction and cannot be forced to lie by, whilst continuing and increasing injuries are destroying the value of their property, until a period arrives when it may be too late for an injunction to be of use to them, even if they could get it after such a lapse of time: *Bell* v. *Midland Railway Company* (2); *Cooper* v. *Crabtree* (3); *Mayfair Property Company* v. *Johnston* (4).

Renshaw, Q.C., and *W. C. Braithwaite*, for the Respondents, made use of the arguments and cited the authorities mentioned in the report of this case in the Court below, and in addition referred to the case of *Whitham* v. *Kershaw* (5).

Cur. adv. vult.

1894. Dec. 18. LORD HALSBURY:—

The Plaintiffs in these two actions complain of a nuisance created by the Defendants by the vibration of their engines, and the annoyance caused by the carrying on of their undertaking. Of the reality and gravity of the nuisance no serious denial has been made before us. The Plaintiffs in the two actions are respectively the lessee and reversioners of the house known as the *Waterman's Arms*. The considerations which arise are applicable to all the Plaintiffs, except in so far as one is lessee and

(1) 58 L. T. (N.S.) 601.
(2) 10 C. B. (N.S.) 287, 306.
(3) 20 Ch. D. 589.
(4) [1894] 1 Ch. 508.
(5) 16 Q. B. D. 613.

the others are reversioners. I will deal with that question separately.

The nuisance being established, it is said, first, that the Defendant company are authorized by law to carry on their business, and that, as they have done all that skill and care can effect to prevent any nuisance, they are in the same position as a railway company, and are entitled to do what they have done under the authority of the Legislature. If the analogy were a correct one, I should think the Defendants had fallen very far short in their proof that they had done all that was possible to prevent a nuisance. A railway company has a definite line of operation within which it may make its works, and, if it does all that can be done to prevent a nuisance in that place, the thing having to be done in that place, and by locomotive engines with the necessity of fire being carried along the railway, the Legislature is taken to have sanctioned that proceeding. No such considerations apply here, quite apart from the difference in the legislative enactments, with which I will deal presently. It is not, however, necessary to deal with this part of the case, and I only mention it to disclaim the notion that I acquiesce in the allegation that it has been proved that it is essential to the carrying on of the electric lighting business in the district in question that there should be a nuisance created.

The main question turns on the construction of the *Electric Lighting Act*, 1882, and the Provisional Order which has become an Act of Parliament. It was boldly contended by Mr. *Moulton* that the Provisional Order protected the undertaking, and that, if a nuisance were necessarily created by the carrying on of the company's undertaking, such nuisance was authorized and even imposed as a duty on the undertakers.

I think it is only necessary to read the Provisional Order in connection with the 10th section of the *Electric Lighting Act*, 1882, to dispose of that argument. The provision in the Act, so far as relates to powers under Provisional Orders, is in these words: "The undertakers may, subject to and in accordance with the provisions and restrictions of this Act, and of any rules made by the Board of Trade in pursuance of this Act, and of any license, order, or special Act authorizing or affecting their

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undertaking, and for the purpose of supplying electricity, acquire such lands by agreement, construct such works, acquire such licenses for the use of any patented or protected processes, inventions, machinery, apparatus, methods, materials, or other things, enter into such contracts, and generally do all such acts and things as may be necessary and incidental to such supply." And then, in the order relied on for the authority to create the nuisance, come the words: "Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused by them." The general Act only gave them power subject, therefore, to the restrictions of the particular order, and the particular order makes them liable for nuisance.

I have also come to the conclusion that the powers given in the 17th section of the Act, when read together with the 32nd section, are applicable to the execution of the works; and when one considers how frequently the distinction between the execution of the works and the use of them when executed has been the subject of comment and discussion, I think it must be taken that the language used has been deliberately chosen by the Legislature as pointing to the distinction, now well recognised, between the construction of works and the user of them when constructed.

But assuming that there is a nuisance, and that there is no authority justifying it, the question still remains, What is the relief to which the Plaintiffs are entitled? But for the provision of *Lord Cairns' Act*, I suppose no one would have doubted that, in the state of facts I have now assumed to exist, the Plaintiff *Shelfer* would have been entitled to an injunction to prevent the continuance of the nuisance. Lord *Kingsdown*, in the House of Lords (*Imperial Gas Light and Coke Company* v. *Broadbent* (1)), has laid down the principle in words which comprehend such a case as this; he says (2): "The rule I take to be clearly this: if a plaintiff applies for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law" (and, I presume, its violation); "but when he has established his

(1) 7 H. L. C. 600. (2) 7 H. L. C. 612.

right at law, I apprehend that unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation."

But it is said, and truly said, that the law has been altered by *Lord Cairns' Act*, and the question is, What construction is to be placed upon that enactment? Undoubtedly it conferred upon Courts of Equity the jurisdiction to award damages which did not exist before. But the question is, Did it mean to interfere with the well settled principles upon which Courts of Equity were in the habit of interfering in such cases as the present? It seems to me that the defects in the powers of the Equity Courts which were sought to be supplied by that statute give ample grounds for the provisions of the statute, without supposing that it meant to revolutionize the principles upon which equitable jurisprudence had been administered up to that time. The language, of course, is general; the discretion given is necessarily wide enough in terms to authorize a Judge to award damages where formerly he would have given an injunction. But there is nothing in this case which to my mind can justify the Court in refusing to aid the legal rights established, by an injunction preventing the continuance of the nuisance. On the contrary, the effect of such a refusal in a case like the present would necessarily operate to enable a company who could afford it to drive a neighbouring proprietor to sell, whether he would or no, by continuing a nuisance, and simply paying damages for its continuance.

But, while I can agree with neither Mr. *Warmington* nor Mr. *Moulton* upon the alternative restrictions which they respectively seek to place upon the statute, I see no trace of any such intended alteration of the principles upon which equity should interfere with an injunction as would be involved in a refusal of an injunction here. And further, I think the question is here covered by authority, of which *Martin* v. *Price* (1), in this Court, is the last example. For these reasons, I think the judgment of Mr. Justice *Kekewich* should be reversed as far as the refusal of an injunction is concerned, and that an injunction should be granted.

(1) [1894] 1 Ch. 276.

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The point which I have reserved for treatment in respect of *Meux's* action depends on their interest in the premises. They are reversioners, and the action by the reversioners can only be justified if the reversion is affected. But how is it possible to contend that the reversion is not affected if the walls of the house are so shaken by the nuisance in question that cracks are developed in the building, which experts consider will increase with the continuance, and indeed the increase, of the sources of vibration, by the erection of larger and more powerful engines?

I think there is ample evidence here of serious and permanent injury to the reversion by the continuance of the nuisance, and that, therefore, the same judgment ought to be given in respect of the reversion.

As the reversioners and the leaseholder represent the entire interest, it will be proper, in respect of the assessment of damages for past injuries, to see that the Defendants are not made liable for the same damages twice over. The result is, that the appeal succeeds so far as the injunction is concerned, and that, therefore, the judgment of Mr. Justice *Kekewich* should be reversed in that respect, and the Defendants should pay the costs.

LINDLEY L.J.:—

The nuisance complained of in these actions is clearly proved as a fact. It is also proved that the nuisance is of a very serious character, and will continue and will increase if the Defendants are allowed to enlarge their machinery and to extend their operations as they propose to do.

The persons who complain of this nuisance are (1.) *Shelfer*, who is a lessee for twenty-one years and the occupier of a public-house near the Defendants' works, and (2.) *Meux's Brewery Company*, who are his lessors. Both ask for an injunction, and for damages for the injury already done. They have not joined in one action, as they might have done; but they have brought separate actions, which, however, came on for trial together.

The learned Judge has refused an injunction in both actions, and has simply directed an inquiry as to damages. From this decision the Plaintiffs in both actions have appealed, and they ask for an injunction.

The Defendants have not appealed: they do not, they say, object to pay damages or compensation; but they strongly object to an injunction; and in opposing an injunction their counsel have contended that the Defendants have done no actionable wrong, that the statute which applies to them authorizes, and indeed requires, them to supply electricity, and that the nuisance complained of is authorized by statute, and must therefore be submitted to by those who unfortunately suffer from it. It was contended by the Plaintiffs that it was not open to the Defendants to take this course without themselves appealing against the judgment for damages; but this contention cannot be supported. The Defendants are entitled if they choose to waive their own right, if any, to appeal, and yet to resist the further relief which the Plaintiffs seek to obtain against them.

The Defendants' contention that the nuisance is authorized by Act of Parliament cannot be supported. This question turns on the *Electric Lighting Act*, 1882, ss. 10, 17, and on the Provisional Orders of 1890 and 1891 made under its authority. Those orders prescribe the conditions on which the Defendants are entitled to exercise their statutory powers; and these orders expressly say that nothing in them shall justify a nuisance. Mr. *Moulton's* argument that the Defendants can justify what they are doing under the Act of Parliament, although not under the orders, is in my opinion displaced by the wording of the Act and orders, which must be read together. When so read they do not legalize any nuisance. Part of the price paid for the right to exercise the statutory powers is that those who exercise them shall not create a nuisance.

Another answer to the Defendants' contention on this head is that sects. 10 and 17 of the statute only relate to damage done in the execution of the company's works, and not to damage done afterwards by the use of engines the erection of which is completely finished.

I will add further that it is clearly for the Defendants to prove, if they can, the truth of their assertion that it is impossible for them to carry on their business without creating a nuisance. The evidence as it stands does not satisfy me that this is really true. The Defendants have not proved that they cannot supply

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electricity properly if they multiply their stations and diminish the power of their engines at each station. It is not shewn that they cannot in this way avoid creating a nuisance at any of their stations.

The nuisance not being legalized, the question arises whether the Plaintiffs are not entitled to an injunction. I will take the tenant's case, *Shelfer's*, first.

Before *Lord Cairns' Act* the tenant certainly would have been entitled to an injunction to protect him during his tenancy. Nothing can be more explicit on this point than the judgment of the House of Lords in *Imperial Gas Light and Coke Company* v. *Broadbent* (1), where a market gardener obtained an injunction against a gas company who injured his crops. Lord *Campbell* L.C., in the course of his judgment in that case, after saying that it was one in which the nuisance continued and had been aggravated, goes on (2): "Then, under these circumstances, unless there is something peculiar in this case, it would be a matter of course to grant an injunction . . . . This is the very case for an injunction, because it is a case in which an action cannot sufficiently indemnify the party who is injured . . . . Then what is the great inconvenience that is to arise to the appellants? It is said that they have a duty to perform to the public. I consider that this is to be regarded as a mere commercial adventure; they have the liberty to make these works for their own profit, but no indictment would lie against them for omitting to do so; no action could be maintained against them if they could not supply gas." He adds that the appellants must either find out some mode by which they can carry on their works without injuring the plaintiff, or must limit their quantity of gas, and that he does not believe that the public will suffer from the injunction being maintained. Lord *Kingsdown* also in his judgment expresses himself thus (3): "The rule I take to be clearly this: if a plaintiff applies for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law,

(1) 7 H. L. C. 600. (2) 7 H. L. C. 610.
(3) 7 H. L. C. 612.

I apprehend that unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation."

Lord *Cranworth*, moreover, in his judgment in this same case, says (1): "If it should turn out that the company had no right so to manufacture gas as to damage the plaintiff's market-garden, I have come to the conclusion, that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on."

This case is accordingly an authority to shew that an injunction would not be refused on the ground that the public might be inconvenienced if an injunction were granted.

But then it is urged that, although this was the law before *Lord Cairns' Act*, that Act has given the Court a discretion to award damages even in the case of a clear continuing nuisance of a serious character.

It is very true that *Lord Cairns' Act* (21 & 22 Vict. c. 27), s. 2, conferred upon the Court of Chancery jurisdiction which it had not before to award damages in lieu of an injunction. That section enacts that "in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction .... against the commission or continuance of any wrongful act .... it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction ...."

The jurisdiction to give damages instead of an injunction is in words given in all cases; but the use of the word "damages" has led to a doubt whether the Act applies to cases where no injury at all has yet been inflicted, but where injury is threatened only. Subject, however, to this doubt, there appears to be no limit to the jurisdiction. But in exercising the jurisdiction thus given attention ought to be paid to well settled principles; and ever since *Lord Cairns' Act* was passed the Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalizing wrongful acts; or in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the

(1) 7 D. M. & G. 436, 462.

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wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (*e.g.*, a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. Expropriation, even for a money consideration, is only justifiable when Parliament has sanctioned it. Courts of Justice are not like Parliament, which considers whether proposed works will be so beneficial to the public as to justify exceptional legislation, and the deprivation of people of their rights with or without compensation. *Lord Cairns' Act* was not passed in order to supersede legislation for public purposes, but to enable the Court of Chancery to administer justice between litigants more effectually than it could before the Act. That this is the view which has always been taken of the Act is plain from *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1), *Clowes* v. *Staffordshire Potteries Waterworks Company* (2), *Krehl* v. *Burrell* (3), and *Martin* v. *Price* (4). In *Martin* v. *Price* the principle on which the Court ought to act was quite recently enunciated and enforced. The Court there said, in a carefully considered judgment—"the plaintiff's legal right, and its infringement already, and threatened further infringement, to a material extent, being thus established, the plaintiff is entitled to an injunction according to the ordinary principles on which the Court is in the habit of acting in these cases. There might, of course, be circumstances depriving the plaintiff of this *primâ facie* right; but we can discover none in this case." In that case, accordingly, the Court of Appeal granted an injunction, which had been refused by the Court below, being of opinion that the discretion given to the Court by *Lord Cairns' Act* had been wrongly exercised. So here, guided by the same principles, I come to the same conclusion.

Without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances, such jurisdiction ought not to be exercised in such cases except under very exceptional circumstances. I will not attempt to

(1) Law Rep. 1 Ch. 349.
(2) Ibid. 8 Ch. 125.
(3) 7 Ch. D. 551; 11 Ch. D. 146.
(4) [1894] 1 Ch. 276, 285.

specify them, or to lay down rules for the exercise of judicial discretion. It is sufficient to refer, by way of example, to trivial and occasional nuisances: cases in which a plaintiff has shewn that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief. In all such cases as these, and in all others where an action for damages is really an adequate remedy—as where the acts complained of are already finished—an injunction can be properly refused. There are no circumstances here which, according to recognised principles, justify the refusal of an injunction; and in my opinion, therefore, an injunction ought to have been granted in the action brought by the tenant.

I pass now to the action brought by *Meux's Brewery Company*, the landlords. They sue in respect of actual and prospective injury to their reversion. Actual injury is proved, for their house is structurally injured by the Defendants' operations, and further prospective injury from continued and increased vibration is also proved. This is not the case of a temporary nuisance, which is likely to cease before the existing tenancy expires, and which nuisance, therefore, although it may affect the present value of the reversion, will not affect its value when it falls into possession. The nuisance is of a totally different character; and for such a permanent nuisance as this, and consequent permanent injury to the reversion, I have no doubt an action by the reversioner for damages would lie. The cases on this subject, from *Baxter* v. *Taylor* (1) downwards, will be found collected in Mr. Justice *North's* judgment in *Mayfair Property Company* v. *Johnston* (2), and I do not therefore refer to them here.

It is true that in *Jones* v. *Chappell* (3) an injunction sought by a reversioner to restrain noise and vibration was refused; but it was refused because they might cease before the reversion came into possession. But in this case it is idle to suppose that the vibration, which is the real cause of the continuing injury, will cease. It must be borne in mind that the Defendants are a corporation created for the express purpose of supplying electricity

(1) 4 B. & Ad. 72. (2) [1894] 1 Ch. 516.
(3) Law Rep. 20 Eq. 539.

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for a time to which no limit can be assigned; and they have gone to great expense in making foundations and erecting permanent works on a large scale. *Jones* v. *Chappell* (1) may be compared with *Clowes* v. *Staffordshire Potteries Waterworks Company* (2). There a reversioner applied for an injunction to restrain the defendants from fouling a stream. The Vice-Chancellor *Malins* refused the injunction, on the ground that the reversion was not materially or permanently injured, and that if it was, the plaintiff's remedy was for compensation under the defendants' special Acts. But on appeal this decision was reversed, and an injunction was granted, Lord Justice *James* saying that the injunction was really a matter of course. This case arose after *Lord Cairns' Act* had come into operation. The common law decisions shew that an action by a reversioner for an injury to his reversion will lie if he can prove actual damage to his reversion, or, as some express it, an injury of such permanent nature as to be necessarily injurious to his reversion. Where this is proved, as it is here, a reversioner is in my opinion entitled to an injunction upon the principles which I have already explained. In *Meux's* action also, therefore, I think an injunction ought to have been granted.

There ought to be one order on both appeals, varying the judgments appealed from by granting an injunction to restrain the Defendants from carrying on their works so as to occasion a nuisance to the Plaintiffs in either action. The form ought to be that adopted when landlord and tenant join in one action to have their respective interests protected. The Defendants must pay the costs of the action brought by *Meux's Brewery Company*, and also the costs of these appeals.

The damages in *Meux's Brewery Company's* action ought to be referred to the same referee to whom the damages in *Shelfer's* action have been referred. This will protect the Defendants from the risk of having to pay more than they ought in the aggregate.

A. L. SMITH L.J.:—

I will first give judgment in the case of *Shelfer* v. *City of London Electric Lighting Company.*

(1) Law Rep. 20 Eq. 539. (2) Law Rep. 8 Ch. 125.

I cannot agree to the proposition put forward by Mr. *Warmington* for the Appellants, that under *Lord Cairns' Act* of 1858 (21 & 22 Vict. c. 27) jurisdiction is only given to the Court of Chancery to award damages in lieu of an injunction in those cases in which application is made for a mandatory injunction, and that there is no jurisdiction to do so if the object of the injunction is to prevent a continuing nuisance. It may well be, as stated by him, that only fourteen cases are to be found in the books since the year 1858 in which damages in lieu of an injunction have been awarded by the Court of Chancery, and that all these are cases in which mandatory injunctions were sought; but this constitutes no canon of construction whereby to interpret sect. 2 of the Act of 1858.

That section is in the widest possible terms, and I can find no limitation as to its applying only where the injunction sought is mandatory as distinguished from an injunction to prevent a continuing nuisance; and as regards jurisdiction, construing the section according to its plain English, I cannot doubt that the Court of Chancery has the power in the one case as in the other to award damages in substitution for an injunction.

The only binding authority which has placed a restricted construction upon the section is *Dreyfus* v. *Peruvian Guano Company* (1), in which it was held in this Court that for an injury, not yet committed but only threatened, the Court of Chancery has no power to award damages.

The present case is not for a threatened injury, but for a continuing nuisance existing at the date of the writ whereby damages have been, and still are being, sustained.

That jurisdiction to award damages exists in the present case I cannot doubt; but whether it should be exercised in such a case is quite another question, and I will deal with that hereafter. It was argued on behalf of the Defendants that even if they were committing the nuisance to the Plaintiff and his family, as found by Mr. Justice *Kekewich*, no injunction could be granted against them, for that the combined effect of sects. 10 and 17 of the *Electric Lighting Act*, 1882 (45 & 46 Vict. c. 56) was to authorize their doing what they were upon making full

(1) 43 Ch. D. 316.

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compensation to the Plaintiff for all damage sustained by him thereby.

In my judgment, this is not the true reading of these sections. Sect. 10, read in conjunction with the interpretation section (32), is confined to construction of the works required to supply electricity, and does not apply to their subsequent user; and sect. 17 is confined to payment of damages caused by the execution of such works, and does not apply to damages caused by their user. And, further, whatever be the true construction of these sections, the Defendants were only authorized by the Act of 1882 to set up works and supply electricity subject to and in accordance with the provisions and restrictions of the order or special Act authorizing or affecting their undertaking; and by the Provisional Order, confirmed by Act of Parliament, under which the Defendants were authorized to erect works and supply electricity, it is expressly provided that nothing therein contained shall exonerate the Defendants from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused by them.

This point of the Defendants appears to me to be wholly untenable, and I agree in the conclusion Mr. Justice *Kekewich* arrived at thereon; and if authorities were wanted (though I think they are not) I refer to the cases cited at the Bar of *Attorney-General* v. *Gaslight and Coke Company* (1) and *Attorney-General* v. *Leeds Corporation* (2).

I now come to the question whether, in a case like the present, to award damages in substitution for an injunction is, or is not, an altogether erroneous exercise of the jurisdiction given by the section. Mr. Justice *Kekewich* has found, and these findings are unappealed against, that the Defendants were, at the date of action brought, creating a continuing nuisance by means of vibration, noise, and steam which were produced by the working of their plant and machinery, whereby not only annoyance, inconvenience, and personal discomfort were occasioned to the Plaintiff, his wife and daughter in the occupancy of their house, but the two latter had been, by the nuisance, made actually ill. There was also evidence that the Defendants, by the erection of

(1) 7 Ch. D. 217. (2) Law Rep. 5 Ch. 583.

their works, had let down the buildings of the Plaintiffs, which consequently cracked, and that the continuous vibration which subsequently arose from the user of their plant and machinery was constantly increasing and aggravating these cracks.

It was proved that the Defendants were producing electricity by means of engines of from 4000 to 5000 horse-power, and that unless stopped by injunction they were about to increase their engine power to not less than at least 20,000 horse-power.

It appears to me, to use the words in the judgment of the Court in *Martin* v. *Price* (1), to which I was a party, that "the plaintiff's legal right, and its infringement already, and threatened further infringement, to a material extent," has been established, and that "the plaintiff is entitled to an injunction according to the ordinary principles upon which the Court is in the habit of acting in these cases."

Then what is there in this case to take it out of the ordinary rule?

There is no suggestion of any conduct on the Plaintiff's part depriving him of his *primâ facie* right to an injunction.

Then why is it that Mr. Justice *Kekewich* awarded damages in the place of an injunction?

The learned Judge appears to have thought that, because the Defendants at the trial had consented to abate the nuisance caused by steam, though not that caused by vibration and noise, damages were the proper remedy and adequate to compensate the Plaintiff. But I would point out that the learned Judge himself stated in his judgment that he was unable to allot to the different matters complained of the part each took in creating the undoubted nuisance proved to exist, and the reasons he gives for awarding damages are as follows: "Having regard to the occupation not having been as a matter of money interfered with, having regard also to this, that the inconvenience is felt very much more at one part of the house than the other, almost exclusively as regards a great part of the complaint in the upper floors, and having regard at any rate to the possibility of some inconvenience and probably some loss of accommodation, of

(1) [1894] 1 Ch. 276, 285.

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making sleeping arrangements elsewhere, which I suppose is possible, having regard also to the large inconvenience to say no more of stopping a business such as carried on by the Defendants, I think this is a case in which damages are a very fair compensation."

It is here that I cannot agree with the learned Judge. Because the Plaintiff does not suffer a money loss, and is only driven out of his upper floors, and has only to make arrangements for sleeping elsewhere, he, according to the Judge, is not entitled to stop the continuance of the nuisance, but damages are a very fair compensation.

Many Judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be.

In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *primâ facie* entitled to an injunction.

There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorized by this section.

In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction the Court may award damages in its place. So again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out.

In my opinion, it may be stated as a good working rule that—

(1.) If the injury to the plaintiff's legal rights is small,

(2.) And is one which is capable of being estimated in money,

(3.) And is one which can be adequately compensated by a small money payment,

(4.) And the case is one in which it would be oppressive to the defendant to grant an injunction:—

then damages in substitution for an injunction may be given.

There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction.

It is impossible to lay down any rule as to what, under the differing circumstances of each case, constitutes either a small injury, or one that can be estimated in money, or what is a small money payment, or an adequate compensation, or what would be oppressive to the defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication. For instance, an injury to the plaintiff's legal right to light to a window in a cottage represented by £15 might well be held to be not small but considerable; whereas a similar injury to a warehouse or other large building represented by ten times that amount might be held to be inconsiderable. Each case must be decided upon its own facts; but to escape the rule it must be brought within the exception. In the present case it appears to me that the injury to the Plaintiff is certainly not small, nor is it in my judgment capable of being estimated in money, or of being adequately compensated by a small money payment.

For nineteen years the Plaintiff is saddled with his lease, and for that period, upon the hypothesis of the nuisance continuing, he is to suffer whatever annoyance, inconvenience, and personal discomfort other than by steam may be created by the user of the works of the Defendants, and the cracks in the walls of the house already made by the Defendants' works are to be increased, and it may be that his wife and daughter throughout that period are to continue to be made ill as heretofore. Can any one truly say that that is a small injury to the Plaintiff's legal rights?

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Moreover, how are these injuries to be put into money, and upon what principle are these damages to be assessed so as to represent the continuing injury to the Plaintiff? To guess at them is not assessing them at all.

In order to constitute a real assessment it appears to me that the principle of purchasing the Plaintiff's interest in his lease for the unexpired term will have to be adopted as the basis upon which the assessment is to be made, and, as I have before stated, this is never sanctioned by the Court at the instance of a tort-feasor. The assessment upon the facts proved will manifestly not result in a small money payment.

In my judgment, for the reasons above, this is clearly not a case in which damages should be granted to the Plaintiff in substitution for the injunction which he asks for, which is an injunction to restrain the continuance of the existing nuisance.

If the remedies the Defendants are about to apply to the steam will abate the nuisance, well and good, and the injunction will not injure them; but if, on the other hand, a nuisance still continues, in my judgment this case is by no means brought within the exception to the ordinary rule, which I have endeavoured to express, and Mr. Justice *Kekewich's* judgment, wherein he awarded damages in substitution for an injunction, must be reversed, and an injunction as prayed for granted.

As regards the case of the reversioners, *Meux's Brewery Company*, that appears to me to give rise to a discussion of somewhat an academic description, so far as the Defendants are concerned, assuming that an injunction is granted against them, as it is in the case of the tenant *Shelfer*. It may, however, be of moment to the Plaintiff reversioners, for the reasons pointed out by Mr. *Warmington*, and more especially as the works of the Defendants, as regards engine power, are about to be enormously increased, which obviously will increase the present continuing injury to the fabric of the house. There is evidence that the Defendants are committing and are proposing to continue to commit acts which are injurious to the fabric of the Plaintiffs' house of a permanent character, and from which a jury would be well warranted in finding an injury to the reversioners.

I agree with what Lord *Halsbury* and Lord Justice *Lindley* have said upon these matters, and that an injunction should go in this case as in the case of the tenant.

For the reasons above given, these appeals must be allowed.

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NOTE.—The case was mentioned again as to the form of the order, and separate orders, namely, one in each appeal, were eventually directed to be drawn up.

Solicitors: *Parry & Gibson; Hunters & Haynes; Ashurst, Morris, Crisp & Co.*

W. W. K.

Considered. *In re* J. W. LOVE [1952] 1 Ch. 138

In re O'SHEA'S SETTLEMENT. COURAGE *v.* O'SHEA.

[1893 O. 82.]

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Bankruptcy—Protected Transaction—"Contract, Dealing, or Transaction"—Charging Order on Stock or Shares—Judgments Act, 1838 (1 & 2 *Vict. c.* 110), *s.* 14—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 49—*Act of Bankruptcy—Notice—Dismissed Bankruptcy Petition.*

Held, that a charging order, under sect. 14 of the *Judgments Act*, 1838, upon stock or shares or money in Court belonging to a judgment debtor, is not a "transaction" protected by sect. 49 of the *Bankruptcy Act*, 1883.

Such an order has not for all purposes the same effect as if it had been voluntarily given by the judgment debtor.

Per Lindley L.J.: *Semble*, notice that a bankruptcy petition has been dismissed is not constructive notice that an act of bankruptcy has been committed by the debtor.

APPEAL by the Official Receiver, as trustee in the bankruptcy of the Defendant *W. H. O'Shea*, against the refusal by Mr. Justice *North* of an application to vary the Chief Clerk's certificate in this action.

The action related to the trusts of an indenture of settlement dated the 11th of January, 1867.

A sum of £49,202 13*s.* 4*d.* New Consols was standing in the names of the trustees of the settlement, two of whom were Plaintiffs in the action.

On the 6th of June, 1893, *Samuel Hannington*, who had on the

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11th of November, 1892, recovered judgment in the Queen's Bench Division against *O'Shea* for £676 3*s.* and costs, obtained from Mr. Justice *North* in Chambers an order *nisi*, charging the interest of *O'Shea* in the £49,202 13*s.* 4*d.* New Consols with the payment of the judgment debt and costs, and interest at 4 per cent. per annum on the judgment debt from the 11th of November, 1892, until payment.

This order was served on *O'Shea*, and it was on the 17th of July, 1893, after hearing him, made absolute.

The New Consols were afterwards transferred into Court in the action.

On the 3rd of August, 1893, the Chief Clerk made his certificate, by which (*inter alia*) he found that there were certain specified incumbrances affecting the share of *O'Shea* in the trust funds, one of the incumbrances specified being the above-mentioned charging order.

By an order dated the 4th of August, 1893, it was directed that a sufficient sum of New Consols should be sold to raise £6000, and that, after payment of costs, the residue of the £6000 should be carried over to "the account of *W. H. O'Shea* and his mortgagees."

On the 13th of December, 1893, a receiving order in bankruptcy was made against *O'Shea* upon a creditor's petition presented on the 30th of May, 1893, and founded on an act of bankruptcy committed on the 26th of May, 1893, and on the 18th of June, 1894, he was adjudicated a bankrupt.

The Official Receiver was appointed trustee in the bankruptcy.

The Official Receiver applied by summons in the action, asking that the Chief Clerk's certificate might be varied by discharging the finding that the charging order was a valid incumbrance upon the fund standing to the credit of *O'Shea*.

Mr. Justice *North* dismissed the summons, upon the ground that it was not proved that, when *Hannington* obtained the charging order, he had notice of an act of bankruptcy alleged to have been committed by *O'Shea*, to which the title of the trustee would relate back. Nor was Mr. Justice *North* satisfied that the alleged act of bankruptcy had been committed.

The decision of the Court of Appeal was based upon an entirely

different ground (which was not argued before Mr. Justice *North*), and it is unnecessary to refer to the evidence as to notice.

Muir Mackenzie, and *J. W. Greig*, for the Official Receiver:—

A charging order is merely a security, and is not protected by either sect. 45 or sect. 49 of the *Bankruptcy Act*, 1883 (1). By sect. 45 executions and attachments are protected; but a charging order is neither an execution nor an attachment: *In re Hutchinson* (2). It is said that a charging order is a "dealing or transaction" with the bankrupt. But it has been decided that those words do not apply to a process *in invitum*, such as a garnishee order: *Ex parte Pillers* (3); *Ex parte Evans* (4). But if it should be held that a charging order is within either of those sections, protection is only given provided that the creditor had no notice of any available act of bankruptcy. The *onus* of shewing that he had no notice is thrown on the creditor; and the creditor in the present case has not done this. On the contrary, it is in evidence that he knew that there had been several petitions in bankruptcy, although they had been dismissed by arrangement. This was sufficient to give him notice of the acts of bankruptcy on which they were founded: *Ex parte*

(1) Sect. 45: "(1.) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

"(2.) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt. . . ."

Sect. 49: "Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy (*inter alia*)—

"(*d*) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration," provided that certain conditions are complied with, one of which is that the person with whom the contract, dealing, or transaction was made or entered into had not at the time of the contract, dealing, or transaction notice of any available act of bankruptcy committed by the bankrupt before that time.

(2) 16 Q. B. D. 515.

(3) 17 Ch. D. 653.

(4) 13 Ch. D. 252.

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Schulte (1); *Ex parte Revell* (2); *In re Sedgwick* (3); *Lucas* v. *Dicker* (4).

S. Hall, Q.C., and *Carrington*, for *Hannington*:—

We did not contend before Mr. Justice *North* that the charging order was protected by sect. 45; we said that it was protected by sect. 49. It was not contended for the trustee that the order was not a "transaction" within sect. 49; but it was said that it was not protected, because *Hannington* had notice of an act of bankruptcy. Mr. Justice *North* only decided that, even if the alleged act of bankruptcy had been committed, of which he was not satisfied, it was not proved that *Hannington* had notice of it.

A bankruptcy petition may be presented in many of the County Courts, as well as in the *London* Bankruptcy Court, and it would be impossible to carry on business if a creditor was bound to search the files of every Court which has bankruptcy jurisdiction. *Hannington*, in fact, had notice only of bankruptcy petitions which had been dismissed.

A charging order is a "transaction" within sect. 49. It is a necessary legal result of the judgment. The judgment was valuable consideration for it. Sect. 14 of the *Judgments Act*, 1838, says that the creditor who has obtained the charging order is to be entitled to all such remedies as he would have been entitled to if the charge had been made in his favour by the judgment debtor. In other words, the order is equivalent to a charge by agreement. This distinguishes *Ex parte Pillers* (5) from the present case.

By reintroducing the word "transaction," which was used in sect. 133 of the *Bankruptcy Act* of 1849, but was omitted from sect. 94 of the *Bankruptcy Act*, 1869, the Legislature must have intended to protect something which was not protected by the Act of 1869. In *Krehl* v. *Great Central Gas Consumers' Company* (6), it was held that a seizure of goods of a bankrupt, by virtue of an authority given by him for valuable consideration, was a "transaction" with him protected by sect. 133.

(1) Law Rep. 9 Ch. 409.
(2) 13 Q. B. D. 727.
(3) 9 Morrell, 217.
(4) 6 Q. B. D. 84.
(5) 17 Ch. D. 653.
(6) Law Rep. 5 Ex. 289.

[Lord Halsbury referred to *Graham* v. *Furber* (1).]

The whole of the circumstances must be looked at, and the charging order must be treated as a security given by the bankrupt in consideration of the judgment. In *In re Leavesley* (2) this Court held that a charging order obtained against a lunatic was valid, and this shews that the validity of the charge does not depend on the actual competency of the debtor to give a charge. In every case it is to be treated as if he had power to give and had given a charge.

[Lindley L.J.:—It appears to me that a charging order is in the nature of an execution: *Haly* v. *Barry* (3).

Lord Halsbury:—In *In re Wright* (4) *Mellish* L.J. (5) said that the omission of the word "transactions" from sect. 94 of the *Bankruptcy Act*, 1869, had made no difference in the meaning.]

In *In re Sedgwick* (6) Mr. Justice *Vaughan Williams* carried the principle of *Lucas* v. *Dicker* (7) too far.

A. a'Beckett Terrell, for the trustees of the settlement.

Muir Mackenzie, in reply:—

Ex parte Pillers is an authority that a proceeding *in invitum* is not a "dealing or transaction."

Sect. 14 of the *Judgments Act*, 1838, means only that the creditor is to have the same right of enforcing his charge, by sale or otherwise, as if it had been given to him by the judgment debtor voluntarily; it does not put the creditor for all purposes in the same position as if he had obtained the charge by agreement.

Lord Halsbury:—

I think we are all agreed that Mr. *Mackenzie's* construction of sect. 49 is correct, and that this charging order is not a "transaction" protected by that section. The order is really more in the nature of an execution. But that will not help the Respondent.

(1) 14 C. B. 134.
(2) [1891] 2 Ch. 1.
(3) Law Rep. 3 Ch. 452.
(4) 3 Ch. D. 70.
(5) Ibid. 78.
(6) 9 Morrell, 217.
(7) 6 Q. B. D. 84.

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It is impossible, to my mind, to give any other interpretation to the word "transaction." I agree with what *Mellish* L.J. said in *In re Wright* (1). It seems to me that a "transaction" is very much the same thing as a "dealing." I cannot get out of the general idea that what the Legislature really intended to protect by that section was *bonâ fide* dealings with the bankrupt as a trader which had been completed before notice of an act of bankruptcy.

This being the condition of things, I think Mr. *Mackenzie's* point is a good one, and that the answer to it is insufficient. It becomes unnecessary, therefore, to enter into the other question of notice, which depends upon a comparison of all the affidavits, and I cannot say that my mind is fully made up upon it. We are in this position, that we really have not before us the same question which was before Mr. Justice *North*. We are deciding the appeal on a totally different point from that which was raised before him. Moreover, the proceedings were entirely wrong. This ought not to have been a motion to vary the Chief Clerk's certificate. The certificate is perfectly right as it stands. The application, I think, ought to have been for a declaration that, notwithstanding the Chief Clerk's certificate, the charging order was invalid as against the trustee in the bankruptcy. The result is that the Appellant must succeed. But we cannot give any costs of the appeal.

Lindley L.J.:—

I am of the same opinion. The substantial question is whether a charging order, obtained upon the fund in Court, under the *Judgments Act*, 1838, s. 14, falls within either sect. 45 or sect. 49 of the *Bankruptcy Act*, 1883, and is valid as against the trustee in bankruptcy of the judgment debtor, whose title relates back to a time anterior to the charging order. Unless the charging order is protected under one or other of those sections, it is not protected at all as against the trustee's title relating to a time anterior to it. Therefore the question we have to consider is, whether the charging order is either a protected "execution" within sect. 45, or a protected "transaction" within sect. 49. It is clearly impossible to hold that the charging order is a protected execution

(1) 3 Ch. D. 70.

within sect. 45, and Mr. *Hall* has very properly declined to argue that it is. We may therefore dismiss sect. 45. But still we cannot throw out of view the real nature of a charging order. It is much more akin to an execution than to what is commonly called a "dealing" or "transaction." It must not be forgotten that a charging order is obtained in the first instance *ex parte*. You obtain first an order *nisi*, and then serve notice of it on the debtor; after which, no doubt, you proceed on notice to him. That being the nature of the order, I cannot think that we should be fairly construing the expression "contract, dealing, or transaction," if we were to hold that such a step, taken behind the back of a debtor, without his sanction, and in which he takes no part whatever, is a "contract, dealing, or transaction by or with" him. I think that would be stretching the words too far. I do not think this is a novel decision, having regard to *Ex parte Pillers* (1), where it was held that a garnishee order was not a "dealing" with a bankrupt under sect. 94 of the *Bankruptcy Act*, 1869, because it was a step *in invitum*, and not in any fair sense of the word a "dealing with" him. In substance and in principle that decision covers the present case. In the *Bankruptcy Act*, 1883, the Legislature have reverted to the language of the *Bankruptcy Act* of 1849, and have introduced again the word "transaction" after "dealing." I doubt whether anything has been gained by that. "Contract, dealing, or transaction" with the bankrupt means something done by him. The words do not point to a proceeding in which the bankrupt is merely passive. And I think it would be straining the language of sect. 14 of the *Judgments Act*, 1838, which says that a creditor who has obtained a charging order shall be entitled to "all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor," if we were to hold that it means that the creditor is to be deemed to be a person in whose favour such an agreement to charge has been made. As the case is not within sect. 49, the trustee's title must prevail.

It is unnecessary for us to deal with the question of notice of an act of bankruptcy. But I am not satisfied that the doctrine of *Lucas* v. *Dicker* (2) could be stretched so far as Mr. *Mackenzie*

(1) 17 Ch. D. 653. (2) 6 Q. B. D. 84.

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has contended—for this reason, that all the bankruptcy petitions were dismissed. I much doubt whether *Lucas* v. *Dicker* (1) and *In re Sedgwick* (2) can be relied on as authority for the proposition that a man who has notice that a bankruptcy petition has been dismissed has notice that an act of bankruptcy has been committed by the debtor. I will say no more about this.

As regards the costs, the summons is entirely misconceived. The certificate was perfectly right when it was made. Mr. *Hannington* had a valid charge; but by reason of the bankruptcy it became invalid as against the trustee, and the proper form of the application would have been that, notwithstanding the certificate, the money should not be paid out to Mr. *Hannington*, but should be paid to the trustee in the bankruptcy. Having regard, therefore, to the fact that the proceedings were wrong in form, and that the point on which the appeal succeeds was not taken before Mr. Justice *North*, I do not think it would be right to give the trustee costs. No costs will be given.

A. L. Smith L.J.:—

The case comes before this Court in a peculiar way. The point argued before Mr. Justice *North*, and on which he based his judgment, has been practically abandoned on the appeal.

The Official Receiver filed new evidence, endeavouring to prove an act of bankruptcy which he had not mentioned in his original affidavit. And, moreover, he has taken a point of law which was not taken before Mr. Justice *North*, viz., that a charging order is not protected by either sect. 45 or sect. 49 of the *Bankruptcy Act*, 1883. Mr. *Hall* has admitted that sect. 45 does not apply; but he has argued that a charging order is a "transaction" protected within sect. 49. The reasons which have been given by Lord *Halsbury* and Lord Justice *Lindley* dispose of this point, and I think the Official Receiver must succeed. Upon a new statement of facts and a new point of law, the Official Receiver is successful; but I think the least we can do is not to allow him any costs.

Solicitors: *Graham Gordon; Nye & Moreton; Leman, Groves, & Leman.*

(1) 6 Q. B. D. 84. (2) 9 Morrell, 217.

W. L. C.

In re R. BOLTON AND COMPANY.

SALISBURY-JONES AND DALE'S CASE.

[0021 of 1894.]

C. A. 1895 Jan. 11.

Company—Liquidation—Costs—Liquidator's Liability for Costs of Successful Litigant.

An application by certain persons to be struck off the list of contributories of a company in liquidation was opposed by the liquidator and was refused with costs; but an appeal from such refusal was allowed with costs above and below:—

Held, that the applicants were entitled to costs only out of the assets of the company, and not against the liquidator personally.

In re Staffordshire Gas and Coke Company (1) overruled.

MOTION TO VARY MINUTES.

In this case three persons, who had been settled on the list of contributories in the winding-up of the above-named company, took out a summons against the Official Receiver and liquidator, for the removal of their names from the list.

Mr. Justice *Wright* dismissed the summons with costs. The Applicants appealed, and their appeal was allowed with costs above and below, Lord Justice *Lindley* dissenting (2).

The order of the Appeal Court, as drawn up by the Registrar, directed the Official Receiver and liquidator to pay to the Appellants the costs of the appeal and of the application out of the assets of the company. The assets being insufficient for the payment of the costs, the Appellants moved to vary the minutes by directing that the liquidator should pay their costs personally.

Rufus Isaacs, for the motion:—

The liquidator having failed on the appeal he is, as between himself and the Appellants, bound to pay the costs personally in accordance with the general rule that a liquidator who fails in litigation is liable for costs, without regard to the question whether the assets are sufficient to reimburse him: *In re Staffordshire Gas and Coke Company.*

(1) [1893] 3 Ch. 523. (2) [1894] 3 Ch. 356.

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O. L. Clare, for the Official Receiver and liquidator.

LINDLEY L.J.:—

The summons in this case was taken out by the Appellants, not by the liquidator. Under such circumstances it is clear that the Appellants are only entitled to costs out of the assets of the company. Mr. Justice *Kekewich*, in the similar case of *In re Staffordshire Gas and Coke Company* (1), appears to have thought that the practice was the other way, and that an order ought to be made against the liquidator personally; but that is not so unless the liquidator has done something to make himself personally liable for the costs. This motion ought to be refused with costs.

A. L. SMITH L.J. concurred.

Solicitors: *Russell & Arnholz; Firth & Co.*

H. C. J.

C. A. 1895 Jan. 17.

KENNEDY *v.* DODSON.

[1892 K. 7427.]

Practice—Interrogatories—Relevancy—Previous Transactions between the same Parties—Rules of Supreme Court, 1883, *Order* XXXI., *r.* 1.

An action was brought for a declaration that a piece of land which had been purchased by the Defendant and *C.* in 1873 was purchased by them as co-partners, and for accounts of the partnership and consequential relief. The Defendant denied the partnership. The Plaintiff exhibited interrogatories to the Defendant asking for particulars of purchases of land by the Defendant and *C.* previous and subsequent to 1873, in order to prove that they had been co-partners in various other purchases similar to that of 1873:—

Held (reversing the decision of the Vice-Chancellor of the County Palatine of *Lancaster*), that the interrogatories were irrelevant to the issue in the action and oppressive, and that they ought not to be allowed.

THIS was an appeal from an order of Mr. *W. F. Robinson*, Q.C., Vice-Chancellor of the Palatine Court of *Lancaster*.

The action was brought by *John Kennedy*, as trustee in the bankruptcy of *Hugh Carswell*, against *J. B. Dodson*, claiming a declaration that a piece of land covered with houses in *Man-*

(1) [1893] 3 Ch. 523.

chester, comprised in an indenture of the 18th of September, 1873, belonged to *Hugh Carswell* and the Defendant as co-partners, and that the Defendant was liable to account to the Plaintiff for the share of *Hugh Carswell* therein, and for the gains and profits arising therefrom, and for accounts and consequential relief.

The statement of claim as amended contained an allegation that, prior to the bankruptcy of *Carswell* and at the date of the indenture of the 18th of September, 1873, *Carswell* and the Defendant carried on business in co-partnership under the firm of *Carswell & Dodson*, as buyers and sellers of, and dealers in, landed property; and that among the purchases so made for the purposes of the said co-partnership business was the property comprised in the said indenture.

The Defendant in his defence denied that he had carried on business in partnership with *Carswell*, and alleged that he and *Carswell* had purchased the land comprised in the indenture of September, 1873, as tenants in common in equal shares; that the land, which was subject to a mortgage to the full value of the property, was in 1889 sold by the mortgagees, and that he, the Defendant, had purchased it from them; and he claimed the property as his own.

On the 30th of October, 1894, the Plaintiff obtained leave to deliver the following interrogatories to the Defendant:—

"1. Give a list of the properties you and the late *H. Carswell* were jointly interested in prior to and subsequent to the 18th of September, 1873.

"2. State the terms and conditions between you and the said *H. Carswell* with respect to the purchase or acquirement of such properties.

"3. Also state in what proportion the purchase-money of such properties was found in each instance.

"4. State how and when such properties respectively were disposed of, and in what proportions was the purchase-money divided between you and the said *H. Carswell*.

"5. State how and in what proportions were the rents or profits arising from such properties disposed of as between you and the said *H. Carswell*.

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"6. Were there any, and if so what, written articles of agreement between you and the said *H. Carswell* with reference to the purchase, management, or sale of any such properties?"

The Defendant objected to answer these interrogatories on the ground that they were irrelevant and oppressive, and that he had already disclosed all documents in his possession or power relating to the matters in issue in the action.

The Plaintiff applied for a further answer to the interrogatories, and the matter was argued before the Vice-Chancellor, who ordered the Defendant to answer the interrogatories. The Defendant appealed from this decision.

Astbury, for the Appellant:—

The questions asked in the interrogatories are not relevant to the matter in issue in this action. The Plaintiff's claim rests entirely upon the ground that the Defendant and *Carswell* purchased the land comprised in the deed of 1873 as partnership property. If the Defendant were to admit that he and *Carswell* had purchased other properties on other occasions on terms of partnership, that would be no evidence that they had purchased the land in question as partnership property. It may be that the questions asked in the interrogatories might be put to the Defendant in cross-examination; but that could only be done to test his credit, not to establish the Plaintiff's case in the action, and it does not justify their being asked as interrogatories: Order XXXI., r. 1; *Attorney-General* v. *Gaskill* (1); *Hollis* v. *Goldfinch* (2). To oblige the Defendant to answer these interrogatories would be most vexatious and oppressive. He would have to go into transactions which took place more than twenty years ago, which had been long ago wound up and the documents relating to them destroyed. With respect to the sixth interrogatory, he has already made an affidavit disclosing the documents in his possession relating to the matters in issue, and the Plaintiff has shewn no special ground for calling in question its correctness. It would therefore be contrary to the practice of the Court to oblige him to make a further affidavit.

(1) 20 Ch. D. 519. (2) 1 B. & C. 205.

Maberly, for the Plaintiff:—

The answers to the interrogatories would be relevant to the issues in the action. The Plaintiff believes that they would shew that the Defendant and *Carswell* have for many years, both before and after 1873, been engaged in partnership in buying and selling land. That would be evidence of a system on which they were working together, and would tend to prove that the purchase in 1873 was also made on partnership terms: *Re Hulton* (1); *Doe* v. *Kemp* (2); *Jones* v. *Williams* (3); *Stephen* on Evidence (4). With respect to the sixth interrogatory, the form of the accounts kept by the Defendant and *Carswell*, which have been produced, tend to shew that there was some kind of partnership between them, and furnishes ground for making further inquiry as to documents: *Hall* v. *Truman, Hanbury & Co.* (5).

LORD HERSCHELL L.C.:—

In this case an action was brought by the Plaintiff, as the trustee in bankruptcy of *H. Carswell*, against the Defendant for a declaration that a certain piece of land at *Manchester*, comprised in an indenture of the 18th of September, 1873, belonged to *Carswell* and the Defendant as co-partners, and that the Defendant was liable to account to the Plaintiff for the share of *Carswell*; and for accounts and relief consequent on that claim. In that action the Defendant denied that he and *Carswell* acquired this property as co-partners, though he did not deny that they acquired it as co-owners. That was the question at issue. Thereupon the Plaintiff, having got a discovery of documents and an affidavit that the Defendant had no other documents in his possession relevant to the issue, exhibited interrogatories to the Defendant. The issue being on what terms the parties, who were co-owners, purchased the property, interrogatories are not admissible if the facts stated in answer to them would not be relevant to that issue. The interrogatories in this case are as follows: [His Lordship read the first five interrogatories.] I will leave the sixth interrogatory for further

(1) 62 L. T. (N.S.) 200.
(2) 2 Bing. N. C. 102.
(3) 2 M. & W. 326.
(4) Arts. 3, 8.
(5) 29 Ch. D. 307.

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observation. In my opinion, these interrogatories are not such that the answers to them would be relevant to the issue. Suppose the Defendant says, "I did enter into such and such transactions at such and such dates on such and such terms," would that be relevant to the issue, what were the terms on which this property was purchased? Could the truth of his statement be tried in this action? Could the Plaintiff say, "I will shew you that *Carswell* and the Defendant purchased twenty properties on certain terms before 1873, and that they purchased ten properties on the same terms afterwards"? Would the Judge be bound to try the question on what terms all these properties were purchased for the purpose of determining the terms upon which the property involved in this action was purchased? No doubt there are cases in which evidence of what happened in one transaction may be relevant to the question what happened in another. I do not dispute that general proposition. In the present case the suggestion is this, that if it can be proved that in a number of prior transactions *Carswell* and the Defendant had been purchasing land on partnership terms, that would render it probable that such was the nature of this transaction also. But that is not relevant evidence. Cases of this description are not determined upon probabilities, but upon evidence of what happened upon the particular occasion. It is said that many of these questions might be put to the Defendant in cross-examination; but that would not be for the purpose of proving what the particular transaction had been, except only to the extent of shewing that the Defendant's evidence as to this particular transaction was not to be credited because of the admissions made by him with regard to the other transactions. But because those questions might be put to the Defendant in cross-examination, it by no means follows that evidence as to such transactions would be relevant evidence to be given in chief by the Plaintiff. I entertain a strong opinion that interrogatories of this description, unless strictly relevant to the question at issue in the action, ought to be rigorously excluded. They cause a great amount of hardship and oppression. They cast upon the Defendant, merely because a writ has been served upon him, the burden of an intolerable amount of trouble and annoy-

ance, and if he refuses to answer he may be sent to prison. Here the Defendant is asked to give a list of all the properties prior to 1873 in which he and the bankrupt were jointly interested, and to state the terms and conditions on which such properties were purchased. In order to answer that question he must rake up all these transactions—it may be for a period of twenty years before 1873. It is said that he may have diaries relating to these transactions. So much the worse for him. He will be a lucky man if he has destroyed them. Nothing shews better than this the wisdom of destroying books and papers relating to transactions which are done with. In my opinion, there has sometimes been great laxity in times past in allowing interrogatories. It is that system which has made the very name of law stink in the nostrils of many sensible men of business. They say they would rather pay a claim for which they are not legally responsible than take the trouble necessary to answer interrogatories of this description, which cause a vast amount of trouble and difficulty, unless they are clearly relevant to the issue.

It is said that the sixth interrogatory ought to be allowed, having regard to the amendment which has been made in the statement of claim. I think that that interrogatory is answered by the Defendant's affidavit of documents, which sets out a number of documents and contains the usual statement that the Defendant has not in his power or possession any other documents relevant to the matters in question. It is true that, notwithstanding the general statement contained in an affidavit of documents, if the Court has reason to believe that some specific document has been omitted it may allow interrogatories to be put as to that. But in this case there is nothing to suggest the existence of any articles of partnership. I see nothing in the account which has been produced by the Defendant which points to partnership as distinguished from co-ownership. It is true that the account is headed "*Carswell & Dodson's* property accounts," and it is more common to find names coupled in the case of partners than in the case of co-owners. But that is far too slight a matter to afford any ground for the belief in the existence of articles of partnership. I think that the Defendant ought not to be compelled to answer these

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interrogatories, and that the judgment of the Vice-Chancellor must be reversed.

LINDLEY L.J.:—

I am of the same opinion. Under ordinary circumstances we should not think of interfering with the decision of the Judge in the Court below in a matter which is very much a matter of discretion. But I cannot help thinking that these interrogatories are vexatious and oppressive to such an extent that the Defendant ought not to be compelled to answer them. They are opposed to the fundamental principles of discovery which are stated in Sir *J. Wigram's* treatise on Discovery. The second proposition stated (1) is as follows: "It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit." That renders it necessary to say a few words as to what are "matters of fact which being well pleaded in the bill are material to the plaintiff's case." What ought a properly drawn bill to contain? It ought to contain a statement of those facts, and those facts only, which, if proved, will entitle the plaintiff to relief. It ought not to contain the evidence of those facts. Of course, it is in some cases difficult to draw the line between those facts which are properly contained in the bill and those which are not; but in case of doubt it has always been the practice of the Court to find out whether the facts as to which information is required are so material as to render discovery reasonable. Sir *J. Wigram* says this (2): "In determining whether *particular* discovery is material or not, the Court will exercise a discretion in refusing to enforce it, where it is *remote in its bearings* upon the real point in issue, and would be an oppressive inquisition." The facts properly stated in this statement of claim are that *Carswell* and the Defendant bought a certain property in *Manchester*, and the Plaintiff alleges that that property is partnership property, and relief is sought on that footing. The Plaintiff is entitled to discovery with reference to

(1) 2nd Ed. p. 15. (2) 2nd Ed. p. 165.

those allegations; but he wants information as to a number of other transactions which took place between *Carswell* and the Defendant in order to raise a probability that this was a partnership transaction. To ask the Defendant to take the trouble to go through his books and papers for so many years is vexatious and oppressive. The vexation and oppression can only be estimated by persons who have to answer interrogatories of this kind. I doubt whether this information would be admissible in evidence; but suppose it would, it does not follow that the Plaintiff would be entitled to discovery of it. Examining witnesses at a trial and obtaining discovery before the trial are two totally different matters. If the decision of the Vice-Chancellor were anywhere near the line, I should be slow to differ from him in a matter which is largely a matter of discretion; but, in my opinion, to compel the Defendant to answer these interrogatories would be most oppressive. I think the appeal should be allowed.

A. L. SMITH L.J.:—

I have also come to the conclusion that these interrogatories ought not to be allowed. In my opinion, the legitimate use, and the only legitimate use, of interrogatories is to obtain from the party interrogated admissions of facts which it is necessary for the party interrogating to prove in order to establish his case; and if the party interrogating goes further, and seeks by his interrogatories to get from the other party matters which it is not incumbent on him to prove, although such matters may indirectly assist his case, the interrogatories ought not to be admitted. The Plaintiff is the trustee in bankruptcy of a person named *Carswell*. He brings an action against the Defendant with reference to the purchase of a plot of land in 1873, and he claims that the land was bought by *Carswell* and the Defendant as partnership property. This is the issue between the parties. Then the Plaintiff administers interrogatories to the Defendant. What does he ask him? Does he ask him a single question relevant to that issue? Does he ask him whether he entered into partnership with *Carswell* as regards that piece of land? He does nothing of the kind. What he does ask him is this:

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"Prior to 1873, and subsequently to 1873, did you have any dealings with *Carswell* as regards land?" He may have had twenty dealings with *Carswell* with regard to other properties; the issue is what was the dealing with regard to this property. I agree that if the Defendant were in the witness-box and denied that he ever was in partnership with *Carswell*, it would be relevant to the question whether he was telling the truth to ask him whether he did not have dealings with regard to properties A, B, and C, and whether he was not in partnership with *Carswell* in respect of each of those properties. But that is pure cross-examination and not the subject-matter for interrogatories. In my opinion, these interrogatories ought not to be admitted, and the appeal ought to be allowed.

Solicitors: *Crofton & Craven, Manchester; Boote & Edgar, Manchester.*

M. W.

NORTH J.
1894
Dec. 19.

In re SHAW.
TUCKET *v.* SHAW.

[1893 S. 2150.]

Power of Appointment—Successive Appointments—Account Duty—Customs and Inland Revenue Act, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*c*)—*Administration—Costs.*

The donee of a power of appointment over a sum of New 3 per cent. Annuities made successive appointments by deed of specific amounts of the annuities, subject to her own life interest, and by will appointed the amount not appointed by deed :—

Held, that the account duty payable under the *Customs and Inland Revenue Act*, 1881, and costs of administering the fund must be borne by the appointees rateably.

IN June, 1879, *Maria Smith*, widow, was entitled to a life interest in £10,917 8*s.* 11*d.* New 3 per cent. Annuities, standing in the names of the trustees of the will of *Charles Shaw*, deceased, with a general power of appointment by deed or will over the fund.

By a deed poll, dated the 5th of June, 1879, *Maria Smith* appointed £2217 8*s.* 11*d.* New 3 per cent. Annuities, part of the fund, to herself, and directed that the sum of £8700 like annuities, the residue of the fund, should be held by the trustees of the will of *Charles Shaw*, after her death, in trust for such of her children and remoter issue as she should by deed or deeds, with or without power of revocation and new appointment, or by her last will or any codicil thereto, appoint.

By an indenture, dated the 1st of March, 1880, *Maria Smith* irrevocably appointed £1000 New 3 per cent. Annuities, part of the said sum of £8700 New 3 per cent. Annuities, unto her son *Charles Shaw Smith*, his executors, administrators, and assigns, subject to the payment to her for her life of the dividends and annual income to arise therefrom.

By a deed poll, dated the 11th of November, 1881, *Maria Smith* appointed the further sum of £1000 New 3 per cent. Annuities, part of the said sum of £8700 New 3 per cent. Annuities, to her son *Charles Shaw Smith*.

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By deed poll, dated the 29th of June, 1882, she appointed (subject to the trusts contained in the will of *Charles Shaw* for her during her life) the sum of £2000 New 3 per cent. Annuities, further part of the said sum of £8700 New 3 per cent. Annuities, to her son *William Shaw Smith*.

By deed polls, respectively dated the 21st of August, 1883, and the 27th of July, 1886, *Maria Smith* appointed (subject to her own life interest) the sums of £500 and £1000 New 3 per cent. Annuities, further parts of the said sum of £8700 New 3 per cent. Annuities, to her daughter *Maria Smith* the younger. The sums appointed to *Charles Shaw Smith*, *William Shaw Smith*, and *Maria Smith* the younger, had all been incumbered.

Maria Smith died on the 31st of January, 1893, having by her will, dated July, 1887, after having recited the five previous appointments by deed mentioned above, appointed "the sum of £3200 New 3 per cent. Annuities, being the part of the said sum of £8700 like annuities then remaining unappointed," unto her daughters, *Maria Smith* the younger and *Elizabeth Skelton Smith*, absolutely equally, share and share alike.

The sum of £8700 New 3 per cent. Annuities was now represented by the sum of £8700 £2 15*s*. Consolidated Stock standing in the names of the trustees of the will of *Charles Shaw*.

The trustees of the will of *Charles Shaw* had paid account duty on the sum of £8700 under sect. 38, sub-sect. 2 (*c*), of the *Customs and Inland Revenue Act*, 1881.

This was the further consideration of an action to administer the trusts of the £8700 Consols held by the trustees of the will of *Charles Shaw*, commenced by summons taken out by an incumbrancer of *Charles Shaw Smith* against the trustees of the will of *Charles Shaw*.

The questions for decision were, out of what shares the account duty, and the costs of the action, were respectively to be borne.

Everitt, Q.C., and *Jessel*; Sir *A. Watson*, Q.C., and *Pochin*; *S. Hall*, Q.C., and *Fellows*; for persons interested under the five appointments made by deed:—

The last appointment made by the will of *Maria Smith* was in the nature of an appointment of residue, and therefore ought

to bear all the costs incident to the administration of the funds, including the payment of the account duty: *Wilson* v. *Kenrick* (1). The account duty is in the nature of probate duty rather than legacy duty, and therefore ought to be borne by the sum appointed last. The account duty is thrown by statute on the whole fund: there is one rate for the whole, and no charge on the separate parts; the determination of how it is to be borne comes within the principle of *In re Bourne* (2) rather than that of *In re Croft* (3).

The question is to some extent one of what the appointor meant, when she made the successive appointments. To take the first appointment; it was not the appointment of an aliquot part of the fund, but the appointment of a specific amount of stock; it was not made subject to duty or costs. If a part of the fund had been lost the first appointee would not have suffered: *Gilbert* v. *Whitfield* (4).

[NORTH J.:—I am with you to the extent that, as at present advised, I think if part of the fund had at any time been lost through wrong investment the loss would have been thrown on the unappointed part of the fund. I do not wish to hear any argument for the Defendants upon the question of the account duty.]

Vernon Smith, Q.C. (*Swinfen Eady*, Q.C., with him), for the trustees and the appointees by will:—

The question of costs is settled by authority: *Farwell* on Powers (5); *Warren* v. *Postlethwaite* (6); *Trollope* v. *Routledge* (7); *Moore* v. *Dixon* (8).

NORTH J. (after having referred to the various appointments made by the late *Maria Smith* by deed, and to her will, continued):—

I refer to the language of the will, not because it is evidence of what was intended by the former appointments, but to shew how consistent her conduct was from first to last.

(1) 31 Ch. D. 658, 662.
(2) [1893] 1 Ch. 188.
(3) [1892] 1 Ch. 652.
(4) 52 L. J. (Ch.) 210.
(5) 2nd Ed. p. 254.
(6) 2 Coll. 116.
(7) 1 De G. & Sm. 662.
(8) 15 Ch. D. 566.

NORTH J. 1894 *In re* SHAW. TUCKET *v.* SHAW.

Taking the first appointment first, it was an appointment of £1000 New 3 per cent. Annuities. I agree that it was not an appointment of an aliquot part of the fund, in the sense that it was an appointment of ten eighty-seventh parts of the whole fund, in whatever state it might happen to be at the time of distribution. But it was an appointment of £1000 annuities, part of a sum of £8700 like annuities, with the intention that the appointee should take that £1000, leaving the remaining £7700 annuities to be dealt with by other appointments, all of which has actually been dealt with by subsequent appointments. The donee of the power reserved a life interest in the sums appointed, and has since died. The fund thereupon became distributable. The Crown authorities then step in and say account duty, under the *Customs and Inland Revenue Act*, 1881, is payable. To that claim there is no answer; for this property is within the words of sect. 38, sub-sect. 2 (*c*), of the Act. But for that claim the trustees of the will of *Charles Shaw*, in whom the property was still vested, would have had nothing to do but to divide the fund among the appointees in proportion to the amounts appointed to them; in that case there would have been sufficient to satisfy each appointment.

If part of the funds had been lost by depreciation in the investment, it may be that the last appointees, namely, those who took under the will of this lady, would have had to bear the loss. But in this case the difficulty arises from the fact that the Government authorities assert their right to receive a part of the trust fund, and say that the trustees must not distribute the fund till this duty is provided for.

The question is, how is that duty to be provided for? Are the trustees, as has been suggested, to take it solely out of the £3200 appointed by the will of the lady? That suggestion is not reasonable. The charge of duty, by which the sum divisible has to be reduced, was imposed by Government, and the reason why the appointees cannot all receive the full sum is, not because any part of the fund is missing, but because the Government are entitled to be paid a duty on the whole sum. I see no reason, authority, or principle why the whole burden of the duty should be thrown on the part of the funds appointed last;

or even why it should have been thrown on that part of the funds, if such part had not been appointed at all.

It seems to me that, as the Government has imposed a duty on the whole fund appointed, the duty must be borne by each share proportionately. If a reference to analogy were permissible in construing an Act imposing a duty, I think the decisions cited in respect of costs afford such analogy; for it has been held that costs ought to be borne by the respective shares in proportion to their amounts. I think this paramount charge thrown by the action of Government upon the fund ought to be borne in the same way. It was urged that the appointments were not made subject to any duty. That is quite true; but neither were they made free from duty. The result will be that the £8700 Consols will be divisible among the several appointees; but the trustees must take the proper duty on each share out of such share: or, to deal more simply with the fund, will divide the remainder after deduction of duty among the appointees in proportion to the amounts appointed; and in the same way the costs will be borne by the several appointees in proportion to their shares. If I had been unable to deal with the costs in this way, I should have given no costs rather than have determined that all the costs should be borne by the share last appointed. But I am very glad to find that there is authority that the costs should be borne rateably. The persons entitled together to each share will have one set of costs.

Solicitors for the persons interested in the five appointments by deed: *C. & E. Woodroffe; R. Chapman; Montague Gosset & Son.*

Solicitors for the trustees of *Charles Shaw's* will, and for the appointees under the will of *Maria Smith*: *Lovell, Son, & Pitfield.*

D. P.

STIRLING J.
1894
May 24; Oct. 25.

Ex parte VICAR OF CASTLE BYTHAM, AND *Ex parte* MIDLAND RAILWAY COMPANY.

Glebe Lands—Lands allotted to Vicar "and his Successors"—Settlement—Improvements on Glebe Lands of the kind authorized by the Settled Land Act, 1882—Loan to Vicar—Security—Temporary Rent-charge—Redemption—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 69—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 21, 32—*Settled Land Acts Amendment Act*, 1887 (50 & 51 *Vict. c.* 30), *ss.* 1, 2.

An award, under an *Inclosure Act* to "*A. B.* and his successors, vicars of *X.*" of lands in respect of glebe is not an instrument limiting an estate or interest in land "to or in trust for any persons by way of succession" so as to constitute "a settlement" within the meaning of sect. 2, subsect. 1, of the *Settled Land Act*, 1882.

But, where the purchase-moneys of glebe lands, comprised in such an award and afterwards taken by a railway company, are paid into Court, then by the combined operation of sect. 32 of the *Settled Land Act*, 1882, and sect. 69 of the *Lands Clauses Consolidation Act*, 1845, and upon the authorities, such moneys may be dealt with as capital moneys arising under the *Settled Land Acts*; and the Court has discretionary jurisdiction under the *Settled Land Act*, 1887, to authorize the application of them in the redemption of terminable rent-charges on the glebe created under the *Land Improvement Act*, 1864.

Adjourned summons.

By a private Inclosure Act (43 Geo. 3, c. lxxxiii.), passed in 1803, commissioners were appointed to divide, allot, and inclose the common and waste lands within the parish of *Castle Bytham*, in the county of *Lincoln*, and the commissioners were authorized and required, amongst other things, to set out, allot, and award unto "*Thomas Fanshaw Middleton*, as vicar of *Castle Bytham* aforesaid, and his successors," such part of the lands intended to be divided, allotted, and inclosed as should be full compensation for the then present uninclosed and glebe lands and rights of common belonging to the said *T. F. Middleton* as vicar as aforesaid.

By their award, dated the 18th of September, 1807, the commissioners allotted and awarded "unto and for the said *Thomas Fanshaw Middleton*, and his successors, vicars of *Castle Bytham*," certain plots of land "in full compensation and satisfaction for such of the glebe lands and rights of common respectively of the

said vicar as were open and unenclosed at the time of passing the said Act"; and these plots of land were from that time treated and enjoyed as part of the glebe lands of the vicarage.

Between the years 1878 and 1884 the present vicar (acting under the *Land Improvement Act*, 1864), with the consent of the Inclosure Commissioners for *England* and *Wales*, and with the sanction of the Bishop and the Dean and Chapter of *Lincoln* (who were the patrons of the living), borrowed from the *Land Loan and Enfranchisement Company* divers sums of money, for the purpose of making improvements and erecting farm buildings upon the glebe lands. The sanction of the patrons was given upon condition that both principal and interest should be paid off within twenty-five years; and the sums so borrowed were accordingly secured by terminable rent-charges upon the whole of the glebe lands, payable half-yearly for the period of twenty-five years.

The sums borrowed were all laid out in permanent improvements upon the glebe lands, which were improvements within the meaning of the *Settled Land Act*, 1882.

The *Midland Railway Company* had recently taken for the purpose of their railway a portion of the glebe lands which had formed the subject of the award, and had paid the purchase-moneys into Court under the *Midland Railway Act*, 1889, and the *Lands Clauses Consolidation Acts*, 1845, 1860, and 1869.

The net income of the living of *Castle Bytham* did not exceed £170 a year, out of which the vicar had to apply £75 5*s.* 6*d.* in keeping down the rent-charges. This he had hitherto regularly done, and he now took out the present summons for the purpose of obtaining an order (*inter alia*) that out of the fund in Court the amount remaining due to the *Land Loan and Enfranchisement Company* might be paid to them, in discharge of their claim over the glebe lands of the benefice, so as to clear off the rent-charges; upon the ground that the moneys borrowed had been laid out in permanent improvements upon settled lands.

The summons first came on on the 24th of May, 1894.

Yate Lee, for the summons:—

The money in Court cannot be applied in paying off the

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rent-charges under sect. 69 of the *Lands Clauses Consolidation Act*; but I suggest that it may be so applied under sect. 1 of the *Settled Land Act*, 1887.

[STIRLING J.:—Is not a rent-charge a "debt or incumbrance affecting the land" within sect. 69 of the *Lands Clauses Act*?]

No. Rent-charges were not considered to be "incumbrances affecting the inheritance" of settled land within sect. 21 of the *Settled Land Act*, 1882; hence arose the necessity for the Act of 1887. The land taken by the railway company is settled land within the meaning of the *Settled Land Act*, 1882, s. 2. Under the Inclosure Act it was awarded to the vicar and his successors, thus creating a settlement for the purposes of the Act of 1882. It is not disputed that the money raised upon the security of the rent-charges was spent by the vicar in executing "improvements," authorized by the Act of 1882, and by sect. 21 of that Act capital money arising under the Act may be applied in payment for such improvements. Again, under sect. 32, money in Court under the *Lands Clauses Act*, 1845, which is liable to be laid out in the purchase of land to be made subject to a settlement, can be applied as capital money arising under the Acts.

Reading sect. 69 of the *Lands Clauses Act* together with the *Settled Land Act*, I submit that the money in Court is liable to be so laid out. That being so, the case comes exactly within sect. 1 of the *Settled Land Act* of 1887.

[STIRLING J.:—If you are right, then the whole of the land could be sold under the *Settled Land Acts*. Has it ever been held that ecclesiastical lands come within those Acts?]

No; but it has been held that charity lands do: *In re Byron's Charity* (1); *In re Bethlehem and Bridewell Hospitals* (2); and *Ex parte Jesus College, Cambridge* (3).

[STIRLING J. referred to *Ex parte Rector of Kirksmeaton* (4) and *Morgan's* Chancery Acts and Orders (5).]

That decision was before the passing of the *Settled Land Act*, 1882.

(1) 23 Ch. D. 171.
(2) 30 Ch. D. 541.
(3) W. N. (1884) 37.
(4) 20 Ch. D. 203.
(5) 6th Ed. p. 28.

[STIRLING J.:—It is clearly a matter of discretion: *In re Smith* (1).]

Yes; but I submit that the Court should exercise it in favour of the Applicant.

STIRLING J. then ordered the case to stand over in order that the patron of the living might be represented, and, if necessary, heard upon the point.

The railway company, who had been made Respondents to the summons, did not appear, as it had been arranged that the costs should be limited to such costs as would have been incurred if the matter had been decided in Chambers.

The summons was then amended by adding the patrons of the living as Respondents, and came on again for further argument on the 25th of October, 1894.

Wace, for the patrons:—

The Court has no jurisdiction to make the order which is here applied for. It is admitted that money paid in under the *Lands Clauses Consolidation Act* cannot under the powers of that Act be applied in paying off terminable rent-charges; and the authorities on that point are *Ex parte Rector of Grimoldby* (2) and *Ex parte Rector of Kirksmeaton* (3). Neither can it be done under the *Settled Land Act*, 1887. The land taken by the railway company was not "settled land" within sect. 2, sub-sects. 1 and 3 (the definitions clause) of the *Settled Land Act*, 1882. The award was not an instrument limiting an estate or interest in land "to or in trust for any persons by way of succession." The word "successors" is used to shew that each vicar is to take, not as an individual, but as an ecclesiastical corporation sole, the whole fee simple, but without the power of alienation. But even if the land actually taken by the company is "settled," the rest of the glebe is not, and the improvements were effected and the money borrowed on the security of the whole glebe; improvements "of a kind authorized by the Act of 1882" are confined to works

(1) 40 Ch. D. 386. (2) 2 Ch. D. 225.
(3) 20 Ch. D. 203.

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"on or in connection with and for the benefit of settled land" exclusively (sect. 25 of the Act of 1882); the redemption of these rent-charges, therefore, is not "payment for an improvement authorized by the Act of 1882" within the Act of 1887. The cases cited under sect. 32 of the Act of 1882 are charity cases, and are not actual authorities as to glebe lands. It is difficult to see how purchase-moneys of glebe lands can be said to be within sect. 32 as moneys "liable to be laid out in the purchase of land to be made subject to a settlement," and the cases should not be extended.

But, at any rate, if the contention of the Applicant on these points can prevail, and there is jurisdiction to make the order, the Court has a discretion whether it will exercise its jurisdiction or not. The present patrons object to this application of the fund in Court upon the ground that it will diminish the value of the living; and I submit that the Court will decline to exercise its discretion on the face of their objection, so as to defeat the condition which was imposed upon the vicar when the patrons for the time being gave their consent to the loan.

Yate Lee, in reply.

STIRLING J.:—

This is an application which raises several questions not free from difficulty under the *Settled Land Acts*. In the view which I take of the case, it is not necessary for me to decide all the points which have been raised; but I desire to take some notice of them in due order. The facts of the case are very simple. [His Lordship then stated part of the facts, and continued:—]

In the years 1878, 1879, and 1884 the vicar thought it desirable to make certain improvements in the way of erecting farm buildings and other things of that sort upon the glebe, and, with the consent of the patrons and the sanction of the Inclosure Commissioners, he raised certain sums for the purpose of making these improvements, all of which were improvements within the *Settled Land Acts*; and in that way certain sums became charged upon the land, and were repayable by half-yearly instalments spread over a period of twenty-five years. The consent of the

patrons was given to that form of raising the money, and they limited their consent to the loans being repayable within twenty-five years, which was under the then existing statute the longest term for which such payments could be extended. That being the state of things, it has come to pass, from causes with which we are all, unfortunately, but too familiar, that the value of the glebe land to the vicar is now much less than it used to be; and it cannot be doubted that he feels heavily the pressure of the payment of these instalments; and he now applies that a portion of the fund in Court should be paid in the redemption of these charges. That cannot be done except under the powers of the *Settled Land Acts*; and in order that the application should be successful it is necessary to shew, first, that the case is within the Act of 1882; and, secondly, that if it be so, it is a case in which the Court ought, in the exercise of its discretion, to use the power vested in it by the *Settled Land Act*, 1887, and to direct the payment applied for to be made.

With reference to the question of the jurisdiction of the Court to make any order at all, two arguments have been urged. First of all, it is said that this is settled land within the meaning of the *Settled Land Act*, 1882, wherein a settlement is defined to be any instrument or instruments under or by virtue of which "any estate or interest in land stands for the time being limited to or in trust for any persons by way of succession." Now, this raises a very wide question, because if that contention is well founded, not only would there be jurisdiction in the Court to deal with this money, but, independently of the Court, each successive vicar would have power to deal with the land from which the money has arisen by way of sale or lease in accordance with the *Settled Land Acts*. This is ecclesiastical land, and by the statute of *Elizabeth* (13 Eliz. c. 20) vicars are prohibited from alienating such land except to a limited extent. The restrictions contained in that statute have been in a certain degree removed in modern times; but in all cases, I believe, alienation cannot take place by an ecclesiastical corporation within the meaning of the statute of *Elizabeth* without the consent of the Ecclesiastical Commissioners, and it is difficult to imagine that when the *Settled Land*

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Act was passed the Legislature intended to repeal the Act of *Elizabeth* as to the extent of alienation, or to dispense in such cases with the consent of the Commissioners. But when one looks at the definition in the 2nd section of the Act of 1882, it appears that this land does not by virtue of this Inclosure Act and award stand limited "to or in trust for any persons by way of succession." No doubt the award is to the vicar and his successors; but the words "and his successors" are only words of limitation introduced to shew that the vicar was to take in his corporate capacity and not as an individual; and they really have an effect similar to that of the words "and his heirs" in a limitation to *A. B.* and his heirs, the words "and his successors" being apt (if not necessary) for the purpose of vesting an estate of inheritance in a corporation sole: see *Co. Litt.* (1). I am, therefore, not prepared to hold that the Inclosure Act and the award constituted or operated as a settlement within the meaning of the Act.

But there is another way of looking at the question, and for this purpose the material section is sect. 32 of the Act of 1882. That section provides that where, under the *Lands Clauses Consolidation Act*, any money has been paid into Court, and is liable to be laid out in the purchase of land to be made subject to the settlement, then that money may be invested or applied as capital money arising under the *Settled Land Act*, as if it had been authorized by the Act under which the money is in Court. There have been a number of decisions, beginning with one by Lord Justice *Fry*, when a Judge of First Instance, in which an interpretation has been put upon the language of that section. The first case is *In re Byron's Charity* (2), and this very point was raised by the learned Judge in the course of the argument. He says: "Can it be said that the purchase-money of land belonging to a charity absolutely is liable to be laid out in the purchase of land to be made subject to a settlement?" And it was argued on behalf of the petitioners that sect. 32 of the Act of 1882 must be read with sect. 69 of the *Lands Clauses Consolidation Act*, and that the money was "settled" within the meaning of sect. 69, and, therefore, was within sect. 32

(1) 8 b. (2) 23 Ch. D. 171.

of the *Settled Land Act*; and the learned Judge said: "I think the 32nd section of the *Settled Land Act* must be read with the 69th section of the *Lands Clauses Act*, and therefore I make the order." Now, if one looks at the 69th section of the *Lands Clauses Act*, it is obvious that the word "settle" is used in a much looser and wider sense than in the *Settled Land Act*. As was pointed out in *In re Byron's Charity* (1), one of the ways in which the money may be applied is to the discharge of incumbrances "affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes." And it may be applied in the "purchase of other lands to be conveyed, limited, and settled upon the like uses, trusts, and purposes, and in the same manner as the land in respect of which such money shall have been paid stood settled." The word used is "settled"; and if the present application had been made under the *Lands Clauses Consolidation Act* for an investment of the fund in Court in the purchase of land for the use of the vicar and his successors, that would have been a proper use of the money, and the land so bought would have stood settled to the like uses as the land taken by the railway company stood settled before it was so taken. The judgment of Lord Justice *Fry* amounts to this, that, inasmuch as in sect. 69 the word "settle" is used in this wide and popular way, the like interpretation must be put on the word "settlement" in sect. 32, and that that word must not be read in the strict sense of sect. 2, sub-sect. 1, of the *Settled Land Act*. The matter does not rest solely on the authority of Lord Justice *Fry*, great as that authority would be; but his decision has been followed without question and apparently without argument by Lord Justice *Kay*, when a Judge of First Instance, in *Ex parte Jesus College, Cambridge* (2), and by Mr. Justice *Chitty* in *In re Bethlehem and Bridewell Hospitals* (3); so that there is the authority of these three learned Judges for the view which is pressed upon me. Having regard to that weight of authority, I am not prepared to take upon myself to say that that interpretation of sect. 32 is one to which I cannot agree. It might, as it seems to

(1) 23 Ch. D. 171. (2) W. N. (1884) 37.
(3) 30 Ch. D. 541.

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me, be a very beneficial one, as it enables the Court to do many things which may well have been within the purview of the Legislature. At all events, I do not dissent from those decisions, although I might have felt some difficulty in coming to the same conclusion myself in the first instance. Therefore, I assume that there is jurisdiction under sect. 32 to deal with the money in Court in accordance with the provisions of the *Settled Land Acts* in the way suggested by the Applicant.

It was formerly held that, under the *Settled Land Act*, 1882, capital money could not be expended in the redemption of terminable charges of this kind. That was decided in *In re Knatchbull's Settled Estates* (1). Then in 1887, shortly after that decision, the *Settled Land Acts Amendment Act* was passed. That Act provides that where an authorized improvement has been made and a rent-charge created, any capital money expended in redeeming such rent-charge shall be deemed to be applied in payment for an improvement authorized by the Act of 1882. The language is peculiar; but it provides, as I have said, that any capital expended in redeeming a rent-charge is to be deemed to be applied in payment for the improvement in respect of which the rent-charge was created. There is, however, I need hardly say, a discretion in the Court as to whether the money shall be so applied or not. There are a number of ways in which it may be applied, and the Court has a discretion in the matter. That is not disputed.

The question then arises whether this is a proper case for the exercise of the discretion vested in me. I have already said that the patrons of the living gave their consent on the terms that the charge should be redeemed within a limited period. None of the ecclesiastical dignitaries who then constituted among them the patrons are now living; but the present patrons appear and object to the order being made. They say, and truly, that the expenditure of this money in Court, which represent *corpus*, would diminish the value of the living, and that they themselves would not have consented to such a charge being created otherwise than for a limited period if they had been asked to do so in the first instance. Ought I

(1) 27 Ch. D. 349.

now to say that this would be a proper application of the fund in Court? It does not appear to me that I ought. I cannot see that if I refuse to make the order there is any hardship on the vicar, for I only keep him to the bargain he made with his eyes open; and if I make the order against the opposition of the patrons I drive them into a bargain they never made and never would have contemplated. I deeply regret that the annual value of the living should have fallen so low; but it is beyond my power to remedy it, and I cannot see that I ought to make the order on any such grounds. The circumstances which have brought that state of things to pass have arisen from causes with which we are all familiar, and which do not affect ecclesiastical lands alone. Having regard, therefore, to what has taken place in the past, I do not see my way to the exercise of my discretion in favour of the present application. The money must be invested and the income paid to the vicar.

Solicitors: *Routh, Stacey, & Castle,* agents for *Stapleton & Hildyard, Stamford; Patersons, Snow, Bloxam, & Kinder,* agents for *Swan & Bourne, Lincoln.*

W. W. K.

KEKEWICH J.

1894

Dec. 6.

BOAKE *v.* STEVENSON.

[1894 B. 1321.]

Practice—Order in Chambers—Motion to Discharge—"Appeal"—Leave from Judge or Court of Appeal—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 50—*Supreme Court of Judicature* (*Procedure*) *Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1.

Notwithstanding the regulations as to appeals in sect. 1 of the *Supreme Court of Judicature* (*Procedure*) *Act*, 1894, an unsuccessful litigant in Chambers in the Chancery Division still has three alternatives—either to move before the Judge in Court to discharge the order made in Chambers, or to have the matter adjourned into Court, or to obtain leave from the Judge to go to the Court of Appeal direct upon his certificate that no further argument is required. But, with a view to preventing delay and expense, the Court will, as far as possible, discourage motions to discharge orders made in Chambers.

A motion to discharge an order made in Chambers is not an "appeal," but a rehearing.

ACTION for alleged infringement of a patent.

On the 19th of November, 1894, the Plaintiffs, *Boake, Roberts & Co.*, applied to Mr. Justice *Kekewich* in Chambers for leave to deliver certain interrogatories to the Defendants, *Stevenson & Howell*, whereupon his Lordship made an order allowing some of the interrogatories, but disallowing the majority of them, and directing that the costs of the application should be costs in the action.

The Plaintiffs now moved, on notice, to discharge or vary that order, and for leave to administer in particular certain of the disallowed interrogatories, together with fresh interrogatories.

The question arose whether a motion to discharge an order made in Chambers was an "appeal" requiring the leave of the Judge or of the Court of Appeal under sect. 1 of the *Supreme Court of Judicature* (*Procedure*) *Act*, 1894.

Sir *R. E. Webster*, Q.C., and *Carpmael*, for the Plaintiffs:—

This is not an "appeal," but a rehearing: *In re Giles* (1); and therefore does not require leave under sect. 1 of the *Supreme Court of Judicature* (*Procedure*) *Act*, 1894.

(1) 43 Ch. D. 391, 395.

[KEKEWICH J.:—I assent to that: this is not an "appeal." You cannot have an "appeal" from the Judge in Chambers to the Judge in Court.]

The practice of the Chancery Division in such cases, recognised by sect. 50 of the *Judicature Act*, 1873, has not been altered. We ask your Lordship to allow the interrogatories, making the costs of the motion costs in the action.

J. C. Graham, for the Defendants:—

I submit that the order in Chambers was right. What the Plaintiffs now desire by this motion is, in substance, to serve fresh interrogatories: but the motion is irregular, and the Plaintiffs ought to pay the costs of it.

KEKEWICH J.:—

A motion which involves a question both of practice and costs is, according to the old rule, doubly important. The point of practice raised by this motion is, so far as I am aware, entirely new. Until the Act of last Session, the *Supreme Court of Judicature* (*Procedure*) *Act*, 1894, it was competent for any litigant to move to discharge an order made by a Judge in Chambers, provided he did so within twenty-one days, which period was afterwards reduced to fourteen days. Upon such motion he is not at liberty to bring in any new documents: all he can do is to shew that the judicial conclusion arrived at in Chambers was wrong. That right of moving to discharge an order made by a Judge in Chambers in the Chancery Division was expressly reserved by sect. 50 of the *Judicature Act*, 1873, which provided that an order made by a Judge in Chambers might be set aside or discharged according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order was made was assigned.

Then came this Act of 1894, dealing with appeals in all Divisions of the Court; and it seemed good to the Legislature that the unsuccessful party should, if desiring to appeal in certain cases there mentioned, go straight to the Court of Appeal, and that the questions between the parties should not be determined by a series of intermediate appeals. That was in order to

KEKEWICH J. 1894 BOAKE v. STEVENSON.

prevent scandal and a large increase of costs. No mention is there made of orders made by the Judge in Chambers in the Chancery Division, and I think the Judges of the Chancery Division are still at liberty to follow the old practice, that is, to allow an unsuccessful litigant in Chambers three alternatives—either he may move to discharge the order, or he may have the matter adjourned into Court, or he may obtain leave to appeal direct upon the certificate of the Judge that no further argument is required. I am satisfied that I am still competent to adjourn a matter in Chambers into Court; that I am still competent to give a certificate to enable the litigant to carry the matter to the Court of Appeal; and that it is still competent to me to hear a motion to discharge an order made in Chambers on notice within fourteen days and on the same materials as were before me in Chambers. As at present advised, and subject to any opinion of my Brother Judges and of the Court of Appeal, I should discourage as far as possible any motion to discharge an order made in Chambers, because it appears to me to have been the intention of the Act of 1894 that all matters should go direct to the Court of Appeal.

This, however, is not a motion to discharge. Sir *Richard Webster* does not venture to say that the order made in Chambers was entirely wrong, but he now asks for leave to deliver fresh interrogatories besides those that were dealt with in Chambers. It is perfectly competent to the Plaintiffs to make an application in Chambers for leave to deliver new interrogatories, notwithstanding the refusal of the existing interrogatories, but it is not right to attempt that under the form of a motion to discharge the order made in Chambers, and the costs of coming here were unnecessary. The motion must be refused, and the Plaintiffs must pay the costs in any event.

Solicitors: *Wilson, Bristows, & Carpmael; Neish, Howell, & Macfarlane.*

G. I. F. C.

In re DAVENPORT. TURNER *v.* KING.

KEKEWICH J.

1894

Dec. 15.

[1894 D. 1913.]

Married Woman—Interest for Life for separate use, followed by general Testamentary Power of Appointment and Limitation to Executors, Administrators, or Assigns—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 2.

Bequest to trustees, in trust to pay income to a woman married subsequently to the *Married Women's Property Act*, 1882, for her life for her separate use, and as to the capital for such persons as she should appoint by will, and, in default of appointment, for her executors, administrators, or assigns:—

Held, that by virtue of the *Married Women's Property Act*, 1882, the life interest and the interest in reversion were alike limited to the separate use of the married woman, and that, on her releasing her power, she would be absolutely entitled.

Whittle v. *Henning* (1) held not applicable.

Adjourned summons.

John Salusbury Davenport, by his will, dated the 15th of February, 1877, appointed *Livius S. King* and *John B. C. Huxham* executors and trustees thereof, and, after making specific bequests, devised all his real estate and bequeathed all his personal estate (not specifically bequeathed) to his trustees, upon trust for sale, payment of the testator's funeral and testamentary expenses and debts, and investment of the residue of the proceeds of sale as therein mentioned. The testator directed that the trustees should pay the annual income of the said trust funds to his wife during her life, and after her decease should hold the said trust funds upon trust to pay the income thereof equally for the benefit and maintenance of his two daughters during their minorities, and, when they should respectively attain the age of twenty-one years, to pay the same income to them in equal moieties during their lives for their separate use, and their receipts alone should be good discharges notwithstanding

(1) 2 Ph. 731.

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coverture; and as to the capital of such trust funds, the testator declared that the same being divided into two equal parts should, as to each moiety thereof, be subject to the appointment by will of his said daughters respectively, and be assigned and paid over by his trustees according to such appointment or appointments, and in default thereof to their executors, administrators, or assigns respectively.

The testator died on the 18th of October, 1877, leaving his widow and two daughters, *Julia Mary Juanita Salusbury* and *Ethel Maud*, him surviving. The testator's widow died on the 26th of January, 1878. The testator's daughter *Julia* was married on the 27th of February, 1890, to *Philip Turner*. The testator's daughter *Ethel Maud* was married on the 16th of March, 1889, to *Frederick Sheridan Shaw*. Neither of the daughters released the testamentary power of appointment conferred on her by the will.

The trust funds remaining subject to the trusts of the will comprised two sums of £392 *India* £3 10*s.* per Cent. Stock, which had been appropriated by the trustees to answer the bequests to the testator's two daughters.

This was an originating summons by the testator's two daughters as Plaintiffs (without the concurrence of their husbands) against the trustees of the will as Defendants, asking for the determination of the question whether the Plaintiffs were or were not respectively entitled to have one moiety of the testator's real and personal estate assured, delivered, and paid to them respectively; and if the question were answered in the affirmative, then for an order directing the Defendants to assure, deliver, and pay the same accordingly.

On the summons coming on before his Lordship to be heard in Chambers, he directed that it should be adjourned into Court, and it now came on for hearing.

It appeared that the interests of the Plaintiffs in the two sums of £392 *India* stock were subject to certain incumbrances. It was also stated that there were certain sums for duty and other charges remaining unpaid, and that there was some real estate belonging to the testator, the particulars and value whereof were not ascertained, and which was subject to an

incumbrance. Under these circumstances the Defendants were not in a position to make any immediate assurance, delivery, or payment to the Plaintiffs, and the Court was merely asked to make a declaration as to the rights of the Plaintiffs.

Ryland, for the Plaintiffs (the married women) and the Defendant *John B. C. Huxham*:—

Apart from the *Married Women's Property Act*, 1882, it must be admitted, on the authority of *Whittle* v. *Henning* (1), and in view of the incapacity of the married women to deal with their reversionary interests, that the present application could not have succeeded. But it is submitted, that the effect of that Act is so to alter the law that these married ladies are, in respect of the bequests in question, in the same position as if they were men or *femes sole*. It is clear that in the case of a man or a *feme sole* limitations such as those in the present case would be equivalent to an absolute gift, even though the power of appointment intervening between the life estate and the estate in reversion be testamentary only: see *Page* v. *Soper* (2); *Devall* v. *Dickens* (3), referred to by Mr. Justice *Stirling* in *In re Onslow* (4). Again, even in the case of a married woman, if the limitation to her separate use extended not merely to the estate for life, but also to the subsequent estate in default of appointment, she would, independently of the *Married Women's Property Act*, 1882, be entitled to claim payment just as though she were a *feme sole*; and now the Act has in effect annexed the limitation to the separate use to the subsequent gift. The present case is practically concluded by *In re Onslow*. It is true that in that case the husband of the married woman concurred; but the judgment shews plainly that if he had not concurred she would equally have been entitled to payment. In that case the interest arose under a settlement, and therefore sect. 19 of the Act had to be considered; but no such objection arises in this case, which can be disposed of under sects. 1 and 2 of the Act. The limitations in that case were practically the same as those in this case, for a limitation to the executors, administrators and assigns of

(1) 2 Ph. 731.
(2) 11 Hare, 321.
(3) 9 Jur. 550.
(4) 39 Ch. D. 622.

KEKEWICH J. 1894 *In re* DAVENPORT. TURNER *v.* KING.

a person is equivalent to a limitation to the person: *Anderson* v. *Dawson* (1).

It is competent to the married women to release their powers: *Conveyancing Act*, 1881 (44 & 45 Vict. c. 41), s. 52.

[KEKEWICH J.:—It is arguable that that section is merely declaratory.]

The *Married Women's Property Act*, 1882, gives power to the married women to contract, and therefore, even if they cannot release the powers, they can bind themselves by contract not to execute them.

Stewart-Smith, for the Defendant *L. S. King*, one of the trustees:—

With the exception of *In re Onslow* (2) there does not appear to be any case in which, under limitations similar to those which occur here, the Court has ordered payment to a married woman in the absence of a power conferred on her to appoint by some instrument taking effect in her lifetime. All the applications have been either by spinsters or widows, or else there has been a power to appoint by deed notwithstanding coverture. In *Devall* v. *Dickens* (3) the application was by a spinster, and in *Page* v. *Soper* (4) by a widow.

In *In re Onslow* the husband of the married woman concurred in the application, and Mr. Justice *Stirling* relied on that. Moreover, in that case the married woman had power to appoint by deed during discoverture. There appears, therefore, to be no authority which will warrant the present application; but the trustees submit to act according to the direction of the Court.

There is here no direct gift to the married women; the only interest which they take is under the directions to the trustees to pay the income to them during their lives.

KEKEWICH J.:—

There is some advantage in this case having been brought before the Court and argued, because the main question which arises here has lately, within my own experience, been of not

(1) 15 Ves. 532, 536.
(2) 39 Ch. D. 622.
(3) 9 Jur. 550.
(4) 11 Hare, 321.

unfrequent occurrence, and in many applications with which I have had to deal the position of the married woman under the *Married Women's Property Act*, 1882, has not been sufficiently borne in mind, and if it had been some difficulties which have arisen might have been solved. In the present case a consideration of the effect of the Act to my mind solves the difficulty.

I do not attribute any importance to the distinction which has been drawn on behalf of the trustees between a direct gift to the daughters and a direction to pay to them. I think that the two forms of gift are equivalent for the present purpose; and according to the authorities it is clear that the ultimate gift to the executors, administrators and assigns of the testator's daughters respectively, in such a connection as that in which I find it here, is equivalent to a gift of the reversion to the daughters themselves. The case, therefore, with which I have to deal is in effect that of property settled upon trust for a married woman for life for her separate use with remainder to such persons as she shall by will appoint, and in default of appointment for herself absolutely.

Now, before the *Married Women's Property Act*, I conceive that in such a case as that the two interests so given to the married woman, even if the power of appointment was cut out or got rid of by release or otherwise, could not coalesce. I use the word "coalesce" because that is the phrase used in the cases. The case to which I have from early times been accustomed to refer upon this subject is *Hanchett* v. *Briscoe* (1), before Sir *John Romilly* in 1856. He goes into the matter at length on pp. 503 and 504 of the report, and, so far as I am aware, the decision in that case has never been departed from; and though I have no note of any case in which it has been cited, I am certainly aware of many in which it has been followed. At the conclusion of his observations Sir *John Romilly* says this: "Cases are cited which, in my opinion, go much further, as *Whittle* v. *Henning* (2), before Lord *Cottenham*, where the interests were of the same quality, but the one had been transferred to the other for the purpose of making them coalesce, Lord *Cottenham* said, he would

(1) 22 Beav. 496. (2) 2 Ph. 731.

KEKEWICH J. 1894 In re DAVENPORT. TURNER v. KING.

not allow her to dispose of the property. But here they are of different qualities; the estate for life is for the separate use, but the reversion is not for the separate use: it is to her absolutely, that is to say, it is only liable to be disposed of by some instrument when she is discovert." In my opinion, the *Married Women's Property Act*, 1882, has removed the difficulty in a case of this kind, because the effect of that Act is that, in the case of a woman married after the passing of the Act, the reversion is equally settled on her for her separate use; the estate for life is for her separate use, and the reversion is also for her separate use. Having regard to that, ought the Court to apply any such doctrine as that of *Whittle* v. *Henning* (1) in order to protect the married woman? It seems to me that the policy of the Act is to make the married woman a *feme sole*—to put her in precisely the same position as regards her property as that which she would occupy if she were a *feme sole*, or in other words, if she were a man instead of a married woman. Any equitable doctrine such as was applied in *Whittle* v. *Henning* for the protection of married women seems to me, under existing circumstances, to be out of place; and the consequence is that the two interests do coalesce, and there is no reason why the married woman should not dispose of her own property as she pleases. I am aware that the result of that is, in great measure, to displace *Whittle* v. *Henning*. That decision will, however, still apply to reversionary interests which are not of the same simple character as that with which I have here to deal. But where, as in the present case, there is an estate for life followed by an estate in reversion, both limited to the separate use of a married woman, and only divided by a power of appointment which may be got rid of, then it seems to me that I should be failing to carry out the policy and principle of the *Married Women's Property Act*, 1882, and the law established by it, if I declined to regard the married woman as the absolute owner for all intents and purposes. I think, therefore, that there must be a declaration that the married women releasing their powers of appointment are absolutely entitled to the shares settled on them in the way I have mentioned. Then the rest of the summons

(1) 2 Ph. 731.

must be dealt with in Chambers. I have said that the married women must release their powers because I am now only making a declaration. If I went on at their request to order payment, I should not require any release of the powers, because the order for payment would operate as a release. But as the order is not in that form, I think there must be releases of the powers.

KEKEWICH J. 1894 *In re* DAVENPORT. TURNER *v.* KING.

Solicitors: *Huxham & Rawlinson; Austin & Austin.*

C. C. M. D.

In re GILCHRIST EDUCATIONAL TRUST.

KEKEWICH J. 1894 Dec. 19.

Charity—Endowment—Trustees' Discretionary Power of dealing with Capital—Mixed Charity—Charity Commissioners—Jurisdiction—Accounts—Contempt—Attachment, Motion for—Form of Order—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *ss.* 62, 66.

A testator bequeathed his residuary personal estate to trustees upon trust to apply the same in such manner as they should "in their absolute and uncontrolled discretion think proper" for the benefit of a charity, which was not supported by any voluntary subscriptions:—

Held, that, notwithstanding this absolute discretionary power of dealing with the trust funds, the bequest was an "endowment" of the charity within sect. 66 of the *Charitable Trusts Act*, 1853, and that the charity, not being a "mixed charity," was not exempted by sect. 62 from the jurisdiction of the Charity Commissioners, who were therefore entitled to demand from the trustees accounts of the property and income of the charity.

In re Clergy Orphan Corporation (1) considered.

JOHN BORTHWICK GILCHRIST, who died in 1841, by a codicil dated the 8th of December, 1840, to his will of even date, directed that the trustees or trustee for the time being of his will should stand possessed of "the residue or surplus of the trust moneys, stocks, funds, and securities thereby to them bequeathed in trust, upon trust to apply and appropriate the same in such manner as they my said trustees or trustee shall in their absolute and uncontrolled discretion think proper and expedient for the benefit, advancement, and propagation of education and learning in every part of the world, as far as circumstances will permit." This gift was held in *Whicker* v.

(1) [1894] 3 Ch. 145.

KEKEWICH J. 1894 *In re* GILCHRIST EDUCATIONAL TRUST.

Hume (1) to be a valid charitable bequest; and the question now arose whether it was exempted by sect. 62 of the *Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137), from the operation and requirements of that Act and the subsequent amending Acts.

The question was raised by a motion by the Charity Commissioners, under the *Charitable Trusts Acts*, 1853 to 1891, for leave to issue a writ of attachment against the trustees of the charity—which was called "*The Gilchrist Educational Trust*"—for neglect of an order made upon them by the Commissioners on the 8th of December, 1893, to deliver a detailed statement of the property of the charity and accounts of the income of the charity.

The property of the charity consisted of investments in English and foreign securities amounting to £106,000, of which £2000 represented capital, and the rest accumulated income, the net income being about £4000 per annum.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the Charity Commissioners, in support of the motion:—

The question here is whether this is a charity subject to the jurisdiction of the Charity Commissioners. If it is a "charity" within the meaning of the *Charitable Trusts Act*, 1853 (2), then

(1) 14 Beav. 509; 1 D. M. & G. 506; 7 H. L. C. 124.

(2) The material parts of sects. 62 and 66 of the *Charitable Trusts Act*, 1853—the sections which were more particularly referred to in the argument—are as follows:—

Sect. 62: "Nor shall this Act extend or be applied . . . . to any friendly or benefit society, or savings bank, or any institution, establishment, or society for religious or other charitable purposes, or to the auxiliary or branch associations connected therewith, wholly maintained by voluntary contributions . . . . and where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this Act; and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from

the trustees are bound to render the accounts half-yearly. This is not a "mixed charity"—that is, a charity supported partly by voluntary contributions, and partly by income from endowments, so as to come within the exemption in sect. 62. It is plainly a "charity" within the definition clause, sect 66, of that Act as amended by sect. 48 of the *Charitable Trusts Amendment Act*, 1855 (18 & 19 Vict. c. 124). The Act of 1853 applies to any "endowment," whether permanent or temporary: sect. 66. A provision for a charity is none the less an "endowment" because it may not last for all time; nor is a charity less a "charity" within sect. 66 because its endowment is not perpetual: *In re Sir Robert Peel's School at Tamworth* (1). Until the trustees of this charity expend the whole of their capital upon charitable purposes (which is scarcely likely), the capital is an "endowment" within the meaning of the Act; and therefore it follows that the trustees must submit to the jurisdiction of the Charity Commissioners and render accounts to them.

Warmington, Q.C., and *Church*, for the Respondents, the trustees of the charity:—

Under the terms of the bequest the trustees have an uncontrolled discretion, and so can put an end to the trust at any

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time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said board or the powers or provisions of this Act . . . ."

Sect. 66: "In the construction of this Act, except where the context or other provisions of the Act may require a different construction . . . . the expression 'charity' shall mean every endowed foundation and institution taking or to take effect in *England* or *Wales*, and coming within the meaning, purvieu, or interpretation of the statute of the forty-third year of Queen *Elizabeth*, chapter four, or as to which, or the administration of the revenues or property whereof, the Court of Chancery has or may exercise jurisdiction . . . . and the expression 'endowment' shall mean and include all lands and real estate whatsoever, of any tenure, and any charge thereon, or interest therein, and all stocks, funds, moneys, securities, investments, and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof. . . ."

(1) Law Rep. 3 Ch. 543, 548, 552.

KEKEWICH J. 1894 *In re* GILCHRIST EDUCATIONAL TRUST.

time; they are at liberty to dispose of every part of the property in the same manner as income. The effect of the exemption clause, sect. 62, is to exempt from the jurisdiction of the Commissioners every donation or bequest for the general purposes of the charity which is given on such terms that the capital may legally be applied for the maintenance of the charity, but to leave subject to the jurisdiction an endowment for general purposes the income of which is applicable to maintenance: *In re Clergy Orphan Corporation* (1). Here the trustees can spend the whole of the gift, both capital and income, for the object specified; they are under no obligation to retain any part of the money. There is no case in which the word "endowment" has been held to apply to a fund the whole of which can be spent as income. We rely on that part of the exemption clause, sect. 62, beginning "And no portion of any such donation or bequest as last aforesaid," as exempting this charity from the jurisdiction of the Commissioners. That exemption covers stronger cases than the present; and we submit that the reasonable way of reading the section is to say that funds which can be spent by the charity as income are not within the jurisdiction of the Commissioners. Here no permanent trust is created—a circumstance which distinguishes this case from *Sir Robert Peel's Case* (2). The scheme of the *Charitable Trusts Act*, 1853, and the ground of the decisions upon it, is that there must be something in the nature of a continuing trust which the Court can lay hold of and administer. The nearest case to the present is *In re Lea* (3), where Mr. Justice *North* refused to sanction a scheme on the ground that the establishment of a permanent trust was not contemplated by the testator in that case. We ask your Lordship to follow the reasoning in that case, and to hold that when the whole gift can be put an end to by one stroke of the pen the exemption in sect. 62 applies.

KEKEWICH J.:—

In order to resist this application, the trustees of the charity must establish that their charity falls within one or more of the exceptions of sect. 62 of the *Charitable Trusts Act*, 1853. It is suggested that there are no special words, or that there may be

(1) [1894] 3 Ch. 145, 150. (2) Law Rep. 3 Ch. 543. (3) 34 Ch. D. 528.

no special words, which cover it, but that there are provisions of a wider kind within which this charity must, upon a benevolent construction of the section, be held to fall. That is not my view of the proper construction of the Act. Where you have an Act, such as the *Charitable Trusts Act*, 1853, conferring general jurisdiction, and then containing specific exceptions from that general jurisdiction, any charity, any institution, falling within the general jurisdiction must come precisely within the limits of some exception in order to be exempt. That the general jurisdiction is applicable if the exception is not to be found, there can be no doubt. This is an endowed charity, and certainly a charity having an endowment is within the meaning of the Act. This charity is not, in one sense, of a permanent character; but it has already lasted some time, and probably will last very much longer.

There is no doubt a power in the trustees, acting in their absolute and uncontrolled discretion, so to deal with the endowment that it may cease to be the endowment of this particular charity—at any rate, cease to be applied in the way in which it is being applied at the present time. I may remark here that I am not called upon to say that the Court will, at any time, direct a scheme, or will allow the Charity Commissioners to lay their hands on any part of the money for any purpose, or to control the discretion vested in the trustees. That is not in any way the question before me. If ever the question is raised, then the words of the will will deserve the fullest consideration. All I am asked now to decide is, whether the trustees are bound to render their accounts of this charity on the ground that it is a charity within the meaning of the Act. As regards their power to divert the charity funds, so as to interfere with the permanency of the charity, *Sir Robert Peel's Case* (1) is not directly in point in one respect, because there the trustees were only to apply the income, and we are here dealing with the case where the trustees' power extends to the *corpus*. But there was a power of revocation which might be exercised at any moment; and the Lords Justices distinctly held that the fact that the power might be exercised at any moment, so that their decision

(1) Law Rep. 3 Ch. 543.

KEKEWICH J. 1894 *In re* GILCHRIST EDUCATIONAL TRUST.

might be rendered of no avail, did not prevent the interference of the Charity Commissioners to the extent of demanding accounts, and did not prevent it being the duty of the Court to insist on that being done. That is a distinct authority against the Respondents on that point.

Then the only other question is whether this charity comes within the exempting clause, sect. 62, of the Act of 1853. The grounds upon which it has been argued that it does seem to me to be unfounded and not to be based upon a proper construction of the clause. It is unnecessary for me to criticize the language of the clause, for I proceed upon the more satisfactory ground that the decision of the Court of Appeal, consisting of Lord *Herschell*, Lord Justice *Lindley*, and Lord Justice *Davey*, in the recent case of *In re Clergy Orphan Corporation* (1), distinctly covers it. The considered judgment of the Court, which was delivered by Lord Justice *Davey*, expressly says (2) that the sentence in sect. 62, which must be read as a proviso, "is made applicable only to 'any such charity as last aforesaid,' *i.e.* to what has been called at the Bar a mixed charity." Here there is not "any such charity as last aforesaid": there is not a mixed charity; and, therefore, that exemption on which the Respondents rely, beginning with the words "and no portion of any such donation or bequest as last aforesaid," is not applicable to this charity. The result is that the words which follow in the judgment to which I have referred, as regards the effect of the proviso, though directly in point as regards the charity then before the Court, have no application at all to this case, and I am obliged to fall back on the general jurisdiction, and to hold that the general jurisdiction covers this charity.

The order should follow, as nearly as possible, the words of the order in *Sir Robert Peel's Case* (3).

The operative part of the order was ultimately drawn up in the following form:—

"This Court, being of opinion that the above mentioned charity, known as

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(1) [1894] 3 Ch. 145. (2) [1894] 3 Ch. 151.
(3) Law Rep. 3 Ch. 543.

the *Gilchrist Educational Trust*, is one within the control of the said Charity Commissioners, and that the said order made by them, dated the 8th of December, 1893, was proper, and that the disobedience to that order was improper and must, under the 14th section of the *Charitable Trusts Act*, 1853, be adjudged to be a contempt of this Court, doth order that the said"—trustees of the charity—"do pay to the said Charity Commissioners their costs of this motion, such costs to be taxed by the Taxing Master."

KEKEWICH J. 1894 *In re* GILCHRIST EDUCATIONAL TRUST.

Solicitors: *J. M. Clabon; F. J. & G. J. Braikenridge.*

G. I. F. C.

In re HAMILTON.
TRENCH *v.* HAMILTON.

[1894 H. 317.]

KEKEWICH J. 1894 *Dec.* 20.

Will—Construction—Precatory Trust—"I wish them to bequeath the same."

A gift purporting to vest the subject of a testator's bounty in a legatee absolutely and for his own benefit is not confined to a life interest or made subject to a precatory trust merely by an expression of the testator's wish that the legatee shall, by will or otherwise, make a disposition in favour of others which could equally be effected by the legatee through his beneficial ownership.

Malim v. *Keighley* (1) held not consistent with *Lambe* v. *Eames* (2), and not followed.

ADJOURNED SUMMONS.

Susanna Hamilton, who died on the 3rd of May, 1857, by her will, dated the 5th of January, 1856, made the following bequests: "I give bequeath and appoint to my dear nieces Mrs. *Gascoigne* and Lady *Ashtown* the sum of £2000 apiece for their sole and separate use and to be independent of their husbands, and I wish them to bequeath the same equally between the families of my nephew *Silver Oliver* and my dear niece Mrs. *Pakenham* in such mode as they shall consider right."

The legacy of £2000 bequeathed to Lady *Ashtown* was paid or accounted for to her. She died on the 23rd of February, 1893, having made a will which in no way referred to the legacy. There were assets in the hands of her executors sufficient for

(1) 2 Ves. 333, 529 a. (2) Law Rep. 6 Ch. 597

KEKEWICH J.

1894

In re HAMILTON. TRENCH *v.* HAMILTON.

payment of the sum of £2000, if the same was held not to form part of her estate.

An originating summons was taken out by the two executors of Lady *Ashtown* (one of whom had since died) as Plaintiffs against the legal personal representative of *Susanna Hamilton* and members of the families of *Silver Oliver* and Mrs. *Pakenham*, in the will of *Susanna Hamilton* mentioned, as Defendants, for the determination (*inter alia*) of the question whether, upon the true construction of the said will, the legacy of £2000 was bequeathed to Lady *Ashtown* absolutely, or whether the same was subject after her decease to any and what trusts in favour of the "families" of *Silver Oliver* and Mrs. *Pakenham*, or otherwise.

The summons was adjourned into Court, and now came on for argument on the question above stated.

Cann, for the Plaintiff, the surviving executor of Lady *Ashtown*:—

I submit that the gift of this legacy of £2000 is absolute, and not subject to any trust, and that the £2000 therefore forms part of Lady *Ashtown's* estate. Whatever might have been held formerly, it is clear that according to the recent authorities the words used by this testatrix, expressive of her wish as to the ultimate destination of the £2000, are not sufficient to create a precatory trust: *Lambe* v. *Eames* (1); *In re Adams and the Kensington Vestry* (2); *In re Diggles* (3).

[KEKEWICH J. referred to *In re Hutchinson and Tenant* (4)].

J. T. Prior, for one of the Defendants, the only child of *Silver Oliver*:—

I submit that under the words of this gift there is a good precatory trust in favour of the families of *Silver Oliver* and Mrs. *Pakenham*. In the first place, it is to be observed that there is here no absolute gift to the two nieces of the testatrix in the first instance; the gift is for "their sole and separate use"—words which are quite consistent with their taking life interests only. It must be admitted that the doctrine of precatory trusts

(1) Law Rep. 6 Ch. 597.
(2) 27 Ch. D. 394.
(3) 39 Ch. D. 253.
(4) 8 Ch. D. 540.

has been somewhat severely attacked in the recent cases; but it is nowhere laid down that that doctrine is exploded. In none of those cases was there anything amounting to such a direct expression of wish as is to be found in the present case. On the other hand, in *Malim* v. *Keighley* (1) words substantially identical with those here used were held to create a precatory trust. For the purpose of creating such a trust the word "wish" is the very strongest that could be used. It comes next in force to the word "direct," and that would create, not a precatory, but an express, trust.

S. L. Bathurst, for another Defendant in the same interest, referred to *Cruwys* v. *Colman* (2).

B. B. Rogers, and *E. P. Hewitt*, for other parties.

KEKEWICH J.:—

The question which I have to consider is whether a precatory trust—a well-known form of expression not requiring any exposition—is created by these words: "I give bequeath and appoint to my dear nieces Mrs. *Gascoigne* and Lady *Ashtown*, the sum of £2000 apiece for their sole and separate use and to be independent of their husbands; and I wish them to bequeath the same equally between the families of my nephew *Silver Oliver* and my dear niece Mrs. *Pakenham* in such mode as they shall consider right." I propose to leave out of consideration the construction of the latter part of the clause, and not to decide or even discuss the question whether the *cestuis que trust*, if *cestuis que trust* there be, are sufficiently designated so that there would be no difficulty in giving effect to the trust if declared. I decide this case independently of that.

It may safely be asserted that a bequest of this kind, or substantially the same as this, has over and over again been held to constitute a precatory trust. The case which was cited by Mr. *Prior* of *Malim* v. *Keighley* is in point. There the property was given "unto such surviving daughter, her executors

(1) 2 Ves. 333; affirmed on appeal 2 Ves. 529 a.
(2) 9 Ves. 319.

KEKEWICH J.

1894

In re HAMILTON.

TRENCH *v.* HAMILTON.

and administrators," so that there were definite words of absolute gift — that is to say, the language used was that which is regarded as a proper limitation of personal estate when it is desired to confer an absolute interest, and a precatory trust was raised on the words which followed, "hereby recommending it to such daughter to dispose of the same after her own death" among the children of one of the testator's daughters and his nephew. That is only one example of many cases to the same effect. But those cases have been departed from. They have not been expressly overruled, but they have been departed from —notably in *Lambe* v. *Eames* (1) and the case before Sir *George Jessel* of *In re Hutchinson and Tenant* (2), where he followed *Lambe* v. *Eames* and called attention to the authorities, observing (3) that under a gift by a testator to his wife absolutely, with something which looks like a superadded power, it has been held that the wife takes a life interest only. The effect of a precatory trust, if it is to be extracted out of a will like this, is to reduce an absolute interest to a life interest. The enjoyment must necessarily be limited to the life of the first taker, if other persons are to enjoy the property after his or her death. In addition to *Lambe* v. *Eames* and *In re Hutchinson and Tenant* there is another case, also before the Court of Appeal, of *In re Adams and the Kensington Vestry* (4), where there was an expression of "full confidence" following on a gift to the testator's wife, her heirs, executors, administrators, and assigns. These are really only examples of what has been held in later years. My opinion is that the old authorities, though not expressly overruled, have been ignored. The Court has taken what, I venture to think, is a much more common sense and sound view, based more or less on the lines of the judgments of the Lords Justices *James* and *Mellish* in *Lambe* v. *Eames*, and, though I cannot find it in any particular case — though no general rule is laid down in any particular case—I am prepared to hold that where there is a gift purporting to vest the subject of the testator's bounty in the legatee absolutely and for his own benefit, the interest of the legatee is not to be reduced to a life interest, and a precatory

(1) Law Rep. 6 Ch. 597.
(2) 8 Ch. D. 540.
(3) 8 Ch. D. 542.
(4) 27 Ch. D. 394.

trust is not to be created, merely by an expression of the testator's wish that the legatee shall, by will or otherwise, make a disposition in favour of others which could equally be effected by the legatee through his beneficial ownership. The only thing I have to consider is whether in this gift the language fails to give the full beneficial ownership in the first instance to the legatee. It is suggested that the words "sole and separate use and to be independent of their husbands" point to a life interest. I do not agree in that. *Corpus* as well as income may well be limited to the separate use of a married woman; and, having regard to the general rule as to the construction of wills which has been introduced by the *Wills Act*, I apprehend this must be treated as a gift to these ladies in the first instance of the absolute interest in the property. Having arrived at that conclusion, the rule which I have ventured to express seems to me to be directly applicable, and the expression on the testatrix's part of a wish that the legatees should bequeath the property becomes immaterial—a mere expression, as I apprehend it was intended to be, of her desire that if they thought fit they would dispose of it in the manner indicated, and not amounting to a trust of legal obligation.

Solicitors: *Wilkinson & Son; Cope & Co.; Hopgoods & Dowson; Preston, Stow, & Preston*, agents for *Rooke & Coker, Bath.*

C. C. M. D.

KEKEWICH J.

1895

Jan. 11.

SHACKELL & CO. *v.* CHORLTON & SONS.

[1895 S. 5.]

Company—Voluntary Winding-up—Landlord and Tenant—Distress for Rent accrued after Winding-up Resolution—Agreement to pay Rent "in Advance"—Apportionment—Beneficial Occupation—Expenses of Winding-up—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 85, 87, 138, 163.

Under an agreement in 1892 the Defendants let to the Plaintiffs, a limited company, a shop for three years at a yearly rent payable quarterly, "two quarters' rent to be always due and payable in advance if required." On the 20th of December, 1894, the company went into voluntary liquidation, but the liquidator continued to occupy the shop for the purposes of the winding-up. The quarter's rent due on the 25th of December not being paid, the Defendants, on the 28th, demanded payment thereof, and also of the next two quarters' rent in advance, and, on payment being refused, proceeded to distrain.

Upon motion by the company for an injunction :—

Held, that the rent for the December quarter must be apportioned, and that the Defendants had only the right to prove in the winding-up for the rent accruing up to the 20th of December, when the winding-up commenced, but were entitled to be paid in full for the rest of the December quarter, and also for so much of the next two quarters as the liquidator should continue in beneficial occupation, rent during such occupation being payable by him as expenses in the winding-up: *In re Lancashire Cotton Spinning Company* (1); but that for the balance of rent for those two quarters the Defendants could only prove in the winding-up.

MOTION for injunction to restrain the sale of distrained goods.

By an agreement made the 3rd of May, 1892, between the Defendants, *Chorlton & Sons* (thereinafter called "the landlord") of the one part, and the Plaintiffs, *Shackell & Co., Limited*, piano and organ manufacturers (thereinafter called "the tenant") of the other part, the landlord agreed to let and the tenant to take a leasehold shop, No. 71, *Piccadilly, Manchester*, for three years from the 25th of December, 1892, at the yearly rent of £250, to be paid quarterly on the usual quarter-days, "two quarters' rent to be always due and payable in advance if required," the tenant covenanting to pay rates and taxes, and to keep the premises and the scheduled fixtures in repair; with a

(1) 35 Ch. D. 656.

proviso for re-entry for non-payment of rent for thirty days after becoming due, and for any breach of the agreement.

The Plaintiff company paid rent up to the 29th of September, 1894. On the 20th of December, 1894, they passed resolutions for a voluntary winding-up and appointing a liquidator. On the 22nd the Defendants received notice from the liquidator of the winding-up. The quarter's rent due on the 25th of December not being paid on that day, the Defendants, on the 28th, demanded payment of that rent, and also of two quarters' rent in advance up to the 24th of June, 1895, pursuant to the agreement. As the company refused payment, the Defendants proceeded to distrain; whereupon, on the 1st of January, 1895, the company issued the writ in this action for an injunction to restrain the Defendants from selling the goods and chattels distrained upon—consisting of a stock of pianos and organs under the charge of the company's manager—and for an order to deliver up possession; and on the same day the liquidator obtained an *ex parte* injunction restraining the Defendants until after the 11th of January, 1895, the first motion day in the Hilary Sittings, from selling or removing the goods and chattels under the distress, with leave to serve notice of motion for the 11th with copy of the writ. The Plaintiffs then served the Defendants with notice of motion for injunction. The Defendants claimed to be entitled to rent from the 20th to the 25th of December, 1894, and also to two quarters' rent in advance from the 25th of December. They were still in possession of the premises under the distress. The liquidator of the company desired to continue the occupation of the premises in order, as he stated in evidence, to effect a favourable realization of the stock-in-trade for the benefit of the company and its creditors, and to carry out pending negotiations for the sale of the business.

Warmington, Q.C., and *Waggett*, for the Plaintiffs:—

This motion is made under the combined operation of sect. 85 of the *Companies Act*, 1862, which empowers the Court to restrain proceedings against a company after the commencement of a winding-up by the Court; of sect. 87, which says that after a winding-up order no proceeding shall be continued against the

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company except by the leave of the Court; and of sect. 138, which enables the liquidator in a voluntary winding-up to apply to the Court to exercise the same powers as in a winding-up by the Court. It would also seem that sect. 163, rendering a distress absolutely void where there has been a winding-up order, is applicable also to a voluntary winding-up.

We admit that some rent is due to the Defendants, the landlords; but the question is, What are their rights with regard to such rent? The principle seems to be that the rent due up to the 20th of December, when the company went into liquidation, must be apportioned under the *Apportionment Act*, 1870 (33 & 34 Vict. c. 35); and that the landlords are entitled only to prove in the winding-up for that apportioned rent, but that they are entitled to be paid in full for the interval between the 20th of December and the 25th, the end of the quarter: *In re South Kensington Co-operative Stores* (1). With regard, however, to the subsequent rent, the landlords cannot claim the whole of the two quarters' rent in advance. All they can claim from the liquidator is the rent accruing during his actual occupation of the premises on behalf and for the benefit of the company, such rent being payable by him as part of the costs of the winding-up: *In re Lancashire Cotton Spinning Company* (2). As to the balance, they must be left to their proof in the winding-up.

Marten, Q.C., and *O. L. Clare*, for the Defendants:—

The landlords are entitled to be paid in full the two quarters' rent in advance as well as the accrued rent up to the 25th of December, according to the agreement. The liquidator must be treated as being in the beneficial occupation of the premises at the time the rent payable in advance was demanded, and, having elected to remain in occupation after the 25th of December on the ground that his so doing would be beneficial to the company, he has thereby affirmed the agreement, and is bound by it, and it is too late now to repudiate his liability. There is no authority to be found in which the Court has dealt with a case of this kind independently of the subsisting relation of landlord and tenant. Here payment of rent in advance was the condition or considera-

(1) 17 Ch. D. 161. (2) 35 Ch. D. 656.

tion on which the landlord agreed to allow the tenant to remain in occupation; and that was the condition subsisting when the liquidator took possession, and he is bound by the bargain. Although the demand for the rent in advance was made after the 25th of December, that is immaterial: the demand might be made at any time during the currency of the quarter: *London and Westminster Loan and Discount Company* v. *London and North-Western Railway Company* (1).

KEKEWICH J.:—

The rent must be apportioned. There is no difficulty to my mind in the construction of the agreement. On payment being required, on the 28th of December, 1894, two quarters' rent immediately becomes "due and payable in advance"; that is, the rent for the half-year ending the 24th of June, 1895. For that, therefore, the landlord is entitled to prove. It is a debt due to him now. He can prove for the whole amount.

But he says he can distrain for that rent; and so I apprehend he could, as against an ordinary tenant, or as against a company tenant not in liquidation; but, a liquidation having ensued, the provisions of the *Companies Act*, 1862, have to be applied, and it really makes no difference that this is a voluntary liquidation, because the Court is entitled and bound to make what order is right and proper, notwithstanding that it is only a voluntary liquidation, just as if there had been an order for winding-up by the Court.

Now, the question is whether the landlord is entitled to distrain. He says he is, on an intelligible and simple principle which depends upon these facts. The liquidation commenced on the 20th of December, 1894, and the liquidator was advised and thought fit to continue in what is called "beneficial occupation"—that is to say, to continue in occupation of the premises for the purposes of the winding-up of which he was master. Therefore, so long as he continues in that occupation he must pay the rent, and pay it in full; he must not throw the landlord on his right to prove for the rent due during that occupation, but must actually pay him 20*s.* in the pound. That applies to

(1) [1893] 2 Q. B. 49.

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the interval between the 20th of December and the end of that current quarter. Therefore the landlord is only entitled to prove in the winding-up for so much of that quarter's rent as accrued up to the 20th of December; but he is entitled to be paid in full for the interval between the 20th and the 25th.

But it is said that by continuing in possession the tenant has made his election—that he might have said, "No; I am not bound by this contract. From to-day I reject it, and the landlord may take back the property if he pleases, but I will pay no rent"; but that he exercised his election in a different way, and said, "I will retain for the benefit of the company"; and that having retained for the benefit of the company he must pay, quarter by quarter, or half-year by half-year, when it becomes due, the rent in full. That is an intelligible principle; but it is not the principle on which the Court has proceeded in these cases, and I do not pause to examine whether it is a sound principle or not. It is enough for me that it is not the principle which has been adopted. The principle is enunciated by Lord Justice *Cotton* in *In re Lancashire Cotton Spinning Company* (1), where he says: "In my opinion the landlord coming to ask the Court to exercise the power which according to the decisions has been given by sect. 87 must shew one of two things, either that it is inequitable for the company or its liquidator to insist on sect. 163"—that means that it is inequitable on him to insist that the landlord should not distrain—"that there is some special equity which entitles the landlord to ask the Court to relieve him of the burthen of sect. 163." That is the first alternative. Now, pausing there, surely it cannot have been in the Lord Justice's mind that election was a special equity. Election would have raised a legal obligation. There cannot be any special equity in election, as distinguished from law; and the Lord Justice was evidently there pointing to what is called equity in the Court of Chancery, that is to say, some reason which operates as against the conscience of the person making a demand and obliges the Court to decide on that conscientious objection. I do not therefore consider that this case can in any way come within that.

(1) 35 Ch. D. 656, 662.

Then the Lord Justice states the other alternative: "Or that it is a case in which the Court will allow distress to be put in so as to recover the rent which ought to be paid as one of the expenses of winding-up." That is a perfectly simple principle; it runs through a very large number of cases. The notion is that, if the liquidator uses the property for the purposes of winding-up, it is just the same as where any costs are incurred in advertising the property for sale; it is part of the expenses incurred, and which ought to be paid in full.

What expenses has the liquidator incurred? Has he incurred the whole of this half-year's rent? He certainly has not yet. He has only incurred up to the present time whatever is incident to his actual possession: but how can I now, on this 11th of January, say that he has incurred this expense as on the 24th of June, 1895? I cannot now say how long he will require to occupy the property: that is a matter in which he has to exercise his discretion, with the assistance of the Court, if an order of the Court is required. I cannot see how I can bring this within the principle; and having found the principle laid down for me, I think I must follow it, though under somewhat novel circumstances. One thing is perfectly clear, namely, that the mere fact of the rent being due and payable does not make it leviable by distress, and I have to consider whether there is anything else which makes it leviable—anything to assist the landlord. It seems to me that there is not.

What ought to be done, I think, is this. The liquidator must have a reasonable time to consider when he is prepared to give up possession and remove his chattels. At the end of that time he must pay the rent to that date as a condition of being allowed to remove his chattels from the distress, and, of course, he must pay what is due up to the 25th of December.

The rest of the rent during the two quarters ending the 24th of June, 1895, is, as I have said, a debt due for which the landlord will have a right of proof in the winding-up. That is all I can do on the present occasion.

What is to happen to the rest of the rent in future I am not now considering. Probably the case need not come back to me to be mentioned, and, therefore, I had better deal with the costs

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at once. I do not think that it is a case in which the landlords can be regarded as having exercised a right of distress improperly by doing any violence to the law of the Court as laid down by decisions, or to the rights of the liquidator. As I decide against the landlords I cannot give them any costs, but I shall not make them pay any. The liquidator will have his out of the estate.

The motion was then treated as the trial of the action, and a perpetual injunction was granted against the Defendants' realizing the distress; the liquidator undertaking to quit and deliver up possession on the 19th of January, and to pay the apportioned sum for rent to that date from the 20th of December.

Solicitors: *Carthew & Wheeler*, agents for *James Morgan, Cardiff; Chester, Mayhew, Broome, & Griffithes*, agents for *Lawson, Coppock, & Hart, Manchester.*

G. I. F. C.

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Nov. 19, 20; *Dec.* 3.

[1894 S. 1297.]

Vendor and Purchaser—Specific Performance—Power to Rescind if Requisitions not withdrawn—Election—Wilful delay—Negotiations with third person.

A vendor's power to rescind the contract may be exercised only in good faith.

Where a vendor having such power under the agreement took advantage of it for purposes of delay while he opened negotiations, unknown to the purchaser, for sale to a third person:—

Held, that by his conduct he deprived himself of his election to affirm the contract, and the purchaser was entitled to treat it as rescinded.

ACTION by purchaser for return of deposit and counterclaim for specific performance.

By an agreement dated the 19th of January, 1894, and made between *J. M. Wallace* (thereinafter called "the vendor") of the one part, and *W. S. Smith* (thereinafter called "the purchaser") of the other part, it was agreed that the vendor should sell and the purchaser should purchase, at the price of £13,500, some leasehold cement works at *Dartford*, with certain fixed plant and machinery, loose chattels, and effects thereon.

A deposit of £1350 was to be paid on the execution of the agreement, which also provided that the balance of the purchase-money should be paid, and the purchase completed, on the 24th of March, 1894.

By clause 3 of the agreement all requisitions on the title, or the evidence of title or the abstract, were to be delivered within fourteen days after delivery of the abstract of title, and this clause also provided as follows:—

"If the purchaser should take any objection or make any requisition, whether in respect of the matters aforesaid or in respect of the conveyance or otherwise, which the vendor is unable or unwilling to remove or comply with, and should not withdraw the same within seven days after being required so to do, the vendor may, by notice in writing delivered to the purchaser or his solicitor, and notwithstanding any intermediate

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representation, negotiation, or litigation, rescind this agreement, and the purchaser shall thereupon return all abstracts and papers which may have been delivered to him or his solicitor by or on behalf of the vendor, and shall not make any claim on the vendor for costs or otherwise."

Clause 7 contained a provision for compensation being paid to the purchaser if it should turn out that any of the plant or machinery did not pass as fixtures.

The purchaser paid the deposit on the execution of the agreement, and the vendor delivered an abstract of title.

The Defendant made requisitions on the abstract, and in particular with regard to the trade machinery, as he had received notice that this belonged to the legal personal representative of one *East*, and that an action would be brought to recover it.

In February and March the purchaser asked the vendor to give him an indemnity in respect of the machinery in the event of his completing the purchase.

On the 7th of March the vendor's solicitors wrote to the purchaser's solicitors a letter expressing regret that the latter should press for an indemnity, and containing the following passage: "As the day for completion is fast approaching, we regret that we cannot allow this matter to remain in its present position, and have therefore to give you notice that the vendor is unwilling to remove or comply with, and calls upon you to withdraw, your requisitions or objections," giving the numbers of certain requisitions which related to, amongst other things, the trade fixtures.

On the 9th of March the purchaser's solicitors replied, in effect declining to withdraw the requisitions; and on the same day Messrs. *Emanuel & Simmonds*, solicitors, wrote to the vendor's solicitors stating that they had been expecting to hear from them in accordance with the suggestions made at an interview with the gentleman in the vendor's solicitors' office who was attending to the matter, and saying that they would be glad to know whether the vendor's solicitors would forward a draft contract upon the terms stated.

This letter referred to negotiations which the gentleman therein mentioned, without the knowledge of the purchaser or

his solicitors, had entered on with a view to selling the property to a client of Messrs. *Emanuel & Simmonds*. In the subsequent correspondence this gentleman wrote the letters sent by the vendor's solicitors.

On the 15th of March the vendor's solicitors sent Messrs. *Emanuel & Simmonds* a draft form of contract of sale for their client to accept, and stated in a letter that on certain terms the vendor would be willing to sell the property to the client in the event of the vendor being entitled to determine the existing contract.

On the same day *Smith's* solicitors wrote to the vendor's solicitors, referring to their letter of the 7th of March and likewise to the fact that the requisitions had not been withdrawn, and saying, "we shall feel obliged by your informing us whether, in consequence of such non-withdrawal, it is your client's intention to rescind the contract, and if not we have to ask you forthwith to proceed to arrange with us as to our client's claim under clause 7, so that we may proceed to get ready for completion, which it is of course useless for us to do while we are in doubt as to your client's intentions as to the rescission of the contract."

On the same day the vendor's solicitors answered as follows: "We have received your letter of the 9th inst. and of to-day, and the questions you raise are of considerable moment. Until we have considered the matter a little more fully we cannot write you definitely, but hope to do so before the end of the week."

On the 17th of March the purchaser's solicitors sent another letter to the vendor's solicitors, stating that they relied on hearing from them definitely "on or before to-morrow as promised"; pointing out that the course pursued by the vendor had placed the purchaser in a very awkward position; and stating that, failing compliance with their requirements, their client would take prompt action in the matter. The same day a letter was sent by the vendor's solicitors to Messrs. *Emanuel & Simmonds*, stating that circumstances had arisen which made it important that the agreement with their client should be completed on the following Monday, or Tuesday morning at the latest; and on the same day they wrote a letter to the purchaser's solicitors

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regretting that they should not be able to write finally on the matter till the following Monday or Tuesday.

The new contract with Messrs. *Emanuel & Simmonds'* client was not, however, finally arranged; and on Monday the 19th of March the purchaser's solicitors wrote to the vendor's solicitors that, not having heard from them definitely as promised, the purchaser considered the contract at an end, and had accordingly made other arrangements. They also asked for a return of the deposit. The negotiations with Messrs. *Emanuel & Simmonds'* client still went on; and on the 21st of March the purchaser's solicitors wrote to the vendor's solicitors, expressing surprise at not receiving an answer to their letter of the 19th of March, and not hearing from them finally as promised in the letter of the 17th, and stating that the deposit must be returned by the following day, or otherwise their instructions were to issue a writ.

Further letters of regret and delay were sent by the vendor's solicitors on the 21st, 22nd, and 27th of March.

On the 29th of March the purchaser issued a writ against the vendor, claiming a return of the deposit, and this writ was sent to the vendor's solicitors on the same day.

On the 30th of March, no binding agreement having been come to with Messrs. *Emanuel & Simmonds'* client, the vendor's solicitors wrote to the purchaser's solicitors suggesting an arrangement with the purchaser on the footing that the contract with him was still binding. Some further correspondence followed; but the purchaser went on with his action, and made a further claim in his statement of claim for payment of the expenses which he had been put to in investigating the title.

The vendor by his defence denied that he had determined the agreement for sale, and he counter-claimed for specific performance of it.

The action was tried before Mr. Justice *Romer* on the 19th and 20th of November, 1894. Several legal questions were discussed, but the only point decided was that the argument of which is reported below.

Neville, Q.C., and *R. F. Norton*, for the Plaintiff:—

This is not a case in which the Court will grant specific per-

formance at the suit of the vendor. It would be inequitable for the Court to interpose in his favour. The power to rescind, though express, is one which a vendor must exercise *bonâ fide* and with promptitude, and such a power cannot be used to put unfair pressure on the purchaser or with an ulterior object. The Court will not encourage vendors in shilly-shallying with a purchaser, particularly where delay is thus obtained for the purpose of negotiating for a sale to a third person.

The Plaintiff was right in treating the contract as rescinded. If it was not rescinded, the vendor had no right to offer the property to another person.

Hopkinson, Q.C., and *Sargant*, for the Defendant:—

Either the contract was rescinded or it was not rescinded.

It could only be rescinded by the Defendant. He put himself in a position to rescind it, but did not rescind it; and the correspondence shews that both parties considered the contract as in existence long after the expiration of seven days from the letter of the 7th of March. There was never any definite contract between the vendor and any third person for a sale to the latter. The Plaintiff's demands having been refused, it was not unreasonable for the vendor to regard him as an unwilling purchaser, and to see whether the existence of a willing purchaser would prevent the necessity of litigation. The Plaintiff was not injured by the negotiations with the other proposed purchaser.

Neville, in reply:—

A vendor has no right to place himself under the temptation to which he would be subject if he could hold the power to rescind over a purchaser while he himself looked out for a better bargain elsewhere. The time must come when a purchaser has a right to say, "I must know whether you intend to rescind or not," and when he may call on the vendor to elect whether the contract is to go on or not. If the vendor does not make his election within a reasonable time, the Court will not afterwards enforce the contract just because he says he has not in terms given actual notice to rescind. The vendor here cannot aver

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that he has always been ready and willing to perform the contract to sell.

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In this case I think the Plaintiff is entitled to relief, having regard to the conduct on the side of the Defendant in relation to the contract which I am about to describe; and this renders it unnecessary for me to consider the other points raised by the Plaintiff. That conduct, in my opinion, was not proper or fair, and entitled the Plaintiff, when he issued his writ, to treat the contract as rescinded, and to have the deposit returned to him.

At the beginning of the correspondence, to which I shall refer, the Plaintiff, as purchaser, had made certain requisitions on title—which I need not go into beyond saying that they raised serious and substantial questions—and the time fixed for completion (the 24th of March) was fast approaching. On the 7th of March the Defendant's solicitors wrote to the Plaintiff's solicitors, and gave formal notice, under clause 3 of the contract, that the vendor was unwilling to remove or comply with, and calling upon the Plaintiff to withdraw, the requisitions in question. On the 9th of March a reply is sent, in substance refusing to withdraw the requisitions; and at the expiration of the seven days mentioned in clause 3 the vendor was in the position of being able, by giving formal notice, to determine the contract. The purchaser, under the circumstances, naturally supposed that such a notice would be promptly sent and the vendor's power to rescind be speedily exercised. That power was a formidable weapon in the vendor's hands, and he was bound to exercise the rights given to him by clause 3 fairly, and to determine promptly whether he would exercise the power or not. He was not entitled to take advantage of his position, and to leave the purchaser in ignorance whether the contract was to be treated as rescinded or not. He certainly was not entitled intentionally to delay deciding whether the contract was to be gone on with or not, and still less was he entitled to use that delay for his own purposes in trying to effect another and more beneficial contract with a third person for sale of the property to that third person. I need not point out the hardship upon the purchaser of allowing

the vendor to play fast and loose with him in such a matter. The purchaser would not know whether he was to get ready for completion or not—whether his requisitions would be further answered, or how they were to be dealt with, or what step he should take, and this at a time when the day fixed for completion was close at hand and he might be held liable under the contract to pay interest on his purchase-money if the contract was not completed on the day fixed.

Now, what did the vendor do in this case? The correspondence speaks for itself, and I need only specially refer to the most important of the letters. Substantially, what he did was this—and, of course, in speaking of the vendor, I am referring to what he did by the solicitor who attended to this matter on behalf of the firm of Messrs. *Paine & Co.*, the Defendant's solicitors and agents—the vendor intentionally delayed informing the purchaser whether the contract was to go on or not, and he used the delay to try and effect a more or equally beneficial contract with a client of Messrs. *Emanuel & Simmonds* for the sale of the property to that client. I infer that it was intended on behalf of the vendor, if he could effect a new contract, to exercise his power and rescind the contract with the Plaintiff. And I fear it was also intended on his behalf, if a new contract could not be finally made, to turn round and say to the Plaintiff that the vendor always contemplated carrying out the contract, and that therefore the old contract was still binding. In fact, he tried to play fast and loose with the Plaintiff. The Plaintiff was not made aware of what the Defendant was doing with respect to the client of Messrs. *Emanuel & Simmonds*; but the Defendant cannot obtain any advantage because he concealed what he was doing from the Plaintiff. The Plaintiff, fortunately for himself, notwithstanding the concealment, apparently could see he was being trifled with; and, the seven days having expired, he on the 15th of March wrote a very proper letter asking the vendor whether he was going to rescind the contract or not, and, if he was not, then to proceed with the Plaintiff's requisitions. Now, even before the expiration of the seven days, namely, as early as the 9th of March (see letter of Messrs. *Emanuel & Simmonds* of that date), the gentleman acting for the vendor had been negotiating

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with Messrs. *Emanuel & Simmonds* for a sale of the property to their client; and on the 15th he had sent to *Emanuel & Simmonds* a draft form of contract for their client to accept, and stated in his letter of that date that on certain terms the vendor would be willing to sell the property to the client in the event of the vendor being entitled to determine the existing contract—an event which, of course, happened at the end of the seven days—and on the same day—the 15th—as the negotiations were still proceeding with *Emanuel & Simmonds*, the gentleman I have referred to replied to the letter of the purchaser's solicitors of the 9th of March by asking for a delay to the end of the week as if for the purpose of further considering the purchaser's requisitions — in reality (as I conclude) for the purpose of arranging a binding contract with Messrs. *Emanuel & Simmonds*' client. The purchaser's solicitors wrote again on the 16th of March, pointing out the embarrassing position in which their client was placed, and stating that they relied on hearing from the vendor's solicitors definitely by the following day, as promised. On the 17th of March the vendor's solicitors urge *Emanuel & Simmonds* to complete the agreement with their client the following Monday or Tuesday; and on the same day the vendor's solicitors write to the purchaser's solicitors asking for time, and stating they will write finally on the following Monday or Tuesday whether the contract is to go on or not—clearly a letter written for the purpose of getting time to arrange with Messrs. *Emanuel & Simmonds*. The new contract with Messrs. *Emanuel & Simmonds*' client cannot, however, be finally arranged as soon as expected by the vendor's solicitors; and on the 19th of March the purchaser's solicitors, tired of being longer trifled with, write to rescind the contract and demand back the deposit. Now, I need not pause to consider what would have been the position if even then the vendor had promptly replied by saying the contract was to go on, for the matter does not rest there. The vendor still delays giving a decision while he prosecutes the negotiations with Messrs. *Emanuel & Simmonds*; and on the 21st the purchaser's solicitors write saying that, as they have not heard finally from the vendor, as promised by the letter of the 17th, they must issue a writ. Still only dilatory letters are sent to

the purchaser by the vendor's solicitors, and the day fixed for completion comes and goes, and the vendor is not on that day determined or prepared to regard the contract as one that is to be carried out, and is not ready to complete. On the 29th the writ in this action is issued; and then, as the negotiations with Messrs. *Emanuel & Simmonds* had not resulted in a binding contract with their client, on the 30th of March the vendors' solicitors write a letter suggesting an arrangement with the purchaser and trying to treat the contract as still in force—a position which the purchaser naturally refuses to accept. It appears to me that, under these circumstances, at the date of the writ the Defendant was not entitled to treat his contract with the Plaintiff as still in force, and that to allow him to do so would be to lend the sanction of the Court to tricky dealing on his part. How can he be heard to say that he regarded his contract with the Plaintiff as binding at the time when he was offering and endeavouring, behind the back of the Plaintiff, to sell the same property to another person? Moreover, through the wilful default of the vendor, the contract could not be completed at the time fixed for completion; and, though in this case time could not be said within the authorities strictly to be of the essence of the contract, yet, I think, even in such a case, a vendor cannot be allowed, wilfully and for his own purposes, outside the contract, to prevent completion on the day fixed, and then to say that the delay was not essential, and that he ought to be allowed to complete at such later time as might be convenient to him. I think a vendor is in every case bound to exert himself in good faith and with due diligence, so that the contract may, so far as he is concerned, be carried out at the date fixed for completion. And if he has shewn (as I think the vendor has shewn here) want of good faith and of due diligence, he cannot properly say that at the date fixed for completion he was able, ready, and willing to carry out the contract on his part.

It is said that in this case what the Plaintiff was entitled to do, when the Defendant refused or neglected to say whether he would determine the contract or go on with it, was to wait a reasonable time, and then say that the contract could not be rescinded. No doubt the Plaintiff had that right; but, under

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the circumstances of this case, was that his only right? For the reasons herein stated, I think not. I think he was also entitled to say that the Defendant could not on his side play fast and loose with the contract, and yet hold the Plaintiff bound on his part. If the Plaintiff had been informed (and he is not in a worse position than he would have been had he been informed) of what was going on—of the Defendant offering the property for sale elsewhere and intending to send the formal notice to rescind if such other sale could be effected—then he would, in my opinion, also be entitled to say (as he did) that the contract was no longer binding on him, and the deposit must be returned. The Defendant could not be in a better position than if he had promply sent the notice to rescind, which in fairness he ought to have sent when he began to try and sell the property away from the Plaintiff.

[His Lordship commented on some of the evidence, and concluded his judgment as follows:—]

I think, therefore, that the deposit must be returned to the Plaintiff and the counter-claim dismissed, and the Defendant must pay the costs of the action and counter-claim. But I do not think the Defendant ought to be put in a worse position than if he had sent the notice to rescind, and I therefore only order the Defendant to pay interest on the deposit at 4 per cent. as from the date of the writ, and I make no further order in favour of the Plaintiff as to payment of his expenses, or as to a lien on the property, and the Plaintiff must return to the vendor all abstracts and papers delivered to him or his solicitors by or on behalf of the vendor.

Solicitors for Plaintiff: *Wilkinson, Howlett, & Wilkinson.*
Solicitors for Defendant: *Paines, Blyth, & Huxtable.*

F. E.

In re NEW TRAVELLERS' CHAMBERS, LIMITED.

ROMER J.

1895

Feb. 4.

[00195 of 1894.]

Company—Winding-up—Public Examination—Companies (Winding-up) Act, 1890 (53 *&* 54 *Vict. c.* 63), *s.* 8.

Where the Court has jurisdiction to make, and has exercised its discretion by making, an order for public examination under sect. 8 of the *Companies (Winding-up) Act,* 1890, the order will not be discharged on the ground that fraud is not sufficiently shewn by the Official Receiver's report on which the order is based.

And where the report is made in good faith, the Court will not allow evidence to be adduced to rebut the charge of fraud thereby made; and will not take the report off the file, or remit it to the Official Receiver in order that other facts, on which the person ordered to be examined relies, may be stated in the report.

THE *New Travellers' Chambers, Limited,* was incorporated on the 28th of May, 1891, as a company with liability limited by shares, some of its objects being to establish and conduct a club, and acquire the benefit of agreements under which the company was to become entitled to a lease of a house in *Piccadilly,* and to the right to use the name of "*The New Travellers' Club.*"

On the 18th of July, 1894, it was ordered that the company should be wound up by the Court.

On the 11th of January, 1895, the Official Receiver filed his further report under sect. 8, sub-sect. 2, of the *Companies (Winding-up) Act,* 1890.

The report stated (amongst other things) that a certain person acting as nominee for one *Douglas* or *Ross* was the promoter of the company, and that certain persons (including three officers of the company) had assisted *Douglas* in the promotion, and had shared in the consideration, consisting of cash and shares, given by the company on purchasing the property. The report also stated that the company had adopted an agreement for the acquisition of the lease of the club-house at a meeting of directors, and that one of the directors present received £1500 from the landlord.

The report also contained allegations with reference to an

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issue of debentures, which was said to be in excess of the company's borrowing powers, and an issue of preference shares, which, it was suggested, had been taken up by the directors with a view to controlling a meeting of the company. The report also stated that a certain resolution had been passed at a board meeting with reference to the appointment of a receiver in an action brought to enforce the debentures. It also contained allegations as to the circumstances under which a new company had been formed to take over the assets, and as to certain evidence relating to value adduced to the Court on an application for its sanction to a sale of furniture and effects belonging to the company in liquidation.

The report did not contain any specific charge of fraud against any person in particular, but concluded as follows: "The Official Receiver is of opinion that the facts hereinbefore set out shew a *primâ facie* case of fraud on the part of some persons, being directors or officers of the company, in relation to its affairs since its formation; and that it is desirable that a public examination should be held of the persons named in the schedule hereto."

The schedule gave the names of four directors and the secretary of the company.

On the 16th of January, 1895, an order was made for the public examination of all the persons named in the schedule to the report. Three of the directors and the secretary served on the Official Receiver notice of motion that the report of the Official Receiver might be ordered to be amended or taken off the file on the ground that the same was not in accordance with the *Companies (Winding-up) Act*, 1890, and that the same materially misstated or misrepresented the effect of the affidavits and documents on which it purported to be founded (particulars of the alleged misstatements being contained in a schedule to the summons), and was otherwise inaccurate, and that the order made on the 16th of January, 1895, on that report, for the public examination of the Applicants, might be discharged, for the reasons aforesaid, and also because (1.) the report did not shew that the Official Receiver was of opinion that any fraud had been committed by any person in the promotion or formation of the

company or by any officer or director of the company in relation to the company since the formation thereof; (2.) the facts stated in the report did not shew that any fraud had been committed by any person, and did not even raise a *primâ facie* case of fraud against any person; and (3.) if such facts were considered as making out a *primâ facie* case of fraud, the fraud was not that of any person in the promotion or formation of the company or of any officer or director thereof.

The particulars alleged (1.) that the report represented that the evidence as to the value of the furniture and effects was given by the secretary, whereas it was not given by him, but by a valuer, named in the particulars, who never was either a director or officer of the company; (2.) that the report, although it referred to the valuer's affidavit, which consisted of only two paragraphs, did not state the fact that the first paragraph contained his evidence that he had valued the furniture and effects; (3.) and (4.) that the report did not state certain other facts as to the secretary's affidavit and the value of the lease.

Swinfen Eady, Q.C., and *George Henderson*, in support of the motion:—

The report does not allege any fraud in the promotion or formation of the company; and, as regards directors or officers of the company, it does not shew facts which amount to fraud. It only insinuates that a director received a commission improperly; that a secret profit was possibly received; that an agreement was adopted by directors, one of whom was not independent; that there was borrowing *ultra vires*; that debentures and preference shares were issued improperly or with improper motives; and that the sanction of the Court to a sale was improperly obtained on the evidence, as to value, of the secretary alone.

Only part of a resolution is set out, but it is stated as if it were the whole of the resolution. The affidavit of the secretary was not the only evidence on which the Court's sanction to the sale was obtained; the affidavit of an independent valuer was also produced. Other material facts are omitted or misstated, and we have an affidavit shewing the true facts.

[ROMER, J.:—I decline to look at it.]

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The report is insufficient on the face of it; it shews no case of fraud, and the order founded on it should be discharged, and the report itself should be taken off the file, or sent back to the Official Receiver to be amended.

The Court clearly has jurisdiction to discharge an order for public examination: *In re Great Krüger Gold Mining Company* (1).

[ROMER J.:—I can understand the Court discharging the order on the ground that there was no jurisdiction to make it.]

It may also discharge it on the ground that the report on which it is based does not comply with the requirements of sect. 8, sub-sect. 2, of the Act of 1890.

The report must allege, not merely suggest, fraud: *In re General Phosphate Corporation* (2).

[ROMER J.:—In that case the Official Receiver had declined to state whether in his opinion any fraud had been committed, or that the facts alleged in the report constituted a *primâ facie* case of fraud.]

The case shews the principles to be acted on in framing the report; it also shews that the Court can send the report back to the Official Receiver, who is an officer of the Court.

[ROMER J.:—Your suggestion is that at the instance of the party examined a sort of half-trial of the case may be had.]

We only say that evidence may be adduced to shew that the report is not one on which a public examination should be ordered.

Sir *R. T. Reid*, A.-G., and *Ingle Joyce*, for the Official Receiver:—

The application, so far as it seeks to have the report taken off the file or sent back for amendment, is novel; and a preliminary trial of the case on its merits, which is what the Applicants desire, was never contemplated by the Legislature.

If the report were corrupt, or the Court had no jurisdiction—*e.g.*, because the person ordered to be examined was never a

(1) [1892] 3 Ch. 307. (2) [1895] 1 Ch. 1, 10.

promoter or officer of the company—the Court might discharge the order.

But the report follows the directions judicially laid down in *In re General Phosphate Corporation* (1). It alleges facts which constitute a *primâ facie* case of fraud.

The creditors of the company in liquidation have been stripped of the assets in favour of a new company, which may pay them, or not pay them, as it thinks fit.

The statement as to the evidence of value, if insufficient, is only a slip in an immaterial portion of the report, and makes no difference as to its effect.

The Court has a discretion whether it will make an order on the report; but when once an order has been made, the person directed to be examined cannot move to discharge the order on the ground that the report states an insufficient case.

[They also referred to *In re Trust and Investment Corporation of South Africa* (2).]

Swinfen Eady, in reply.

ROMER J.:—

This application raises two questions.

In the first place, it is said, on behalf of the Applicants, that they rely on facts which are not stated in the Official Receiver's report, but which, if formulated in that report, would tend to shew that even a *primâ facie* case of fraud could not be made out. In fact, the Applicants ask the Court to be allowed to go into evidence to see whether the *primâ facie* case of fraud shewn by the report cannot be rebutted or answered. I decline to go into such further evidence at all. I think that a practice of allowing a sort of half-trial, in the kind of way sought for by the Applicants, and a conflict of evidence on affidavit, would be, not only inconvenient, but most prejudicial to the proper working of the provisions of the Act; and I will certainly not be a party to any such practice. In my judgment, it was not contemplated by the Act that there should be a preliminary contest of this kind; and I may add that in this case there is no suggestion

(1) [1895] 1 Ch. 1, 10. (2) [1892] 3 Ch. 332.

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that the Official Receiver has not acted in good faith. The motion, therefore, so far as it is based upon the ground that the Applicants should be allowed to go into evidence to supplement the report, and that the report should for this purpose be sent back or taken off the file, is wholly misconceived. I think that the Court ought not to listen to any such application. So much for the application so far as it seeks to have the report sent back or amended, or to incorporate in it facts which do not now appear on the face of it.

Then it is said that the report shews no case of fraud within the meaning of sub-sect. 2 of sect. 8 of the Act. But this report fulfils in terms the requirements of the Act, which gives the Court jurisdiction to make an order for public examination if it thinks fit so to do. This report does state the opinion of the Official Receiver that fraud has been committed by directors or officers of the company in relation to the company since its formation, and therefore, so far as the report itself is concerned, it gives the Court jurisdiction to make an order for examination if it thinks fit. Moreover, I think the case was one in which the Court, having jurisdiction, rightly exercised its discretion by ordering the examination provided for by sect. 8, sub-sect. 3, of the Act. For not only is there the opinion of the Official Receiver, but the facts stated in his report shew, in my opinion, that that opinion had a substantial basis, and that it was advisable to make an order for public examination. The Court both had jurisdiction to make, and in the exercise of its discretion has made, the order. Under these circumstances, is a person who has been ordered to be examined at liberty to move to discharge the order on the ground that no fraud, strictly speaking, is proved by the statements in the report, and to raise a preliminary argument upon the wording of the report, or as to the precise fraud shewn by the report, and so forth? I think not. It would be a most inconvenient course, and one which, in my judgment, was not contemplated by the Legislature. If the report states a case which, in the opinion of the Official Receiver, acting honestly and in good faith, shews fraud, and he states that opinion, and the Court then, on consideration of the report, thinks that ground is shewn in the report for the Official

Receiver's opinion, there is jurisdiction in the Court to make the order for examination. And if the Court, having jurisdiction to make the order, in the exercise of its discretion does make the order, I think that ends the matter; and that the persons affected by the report ought not to be allowed to apply to the Court and argue the case whether the Court has exercised its discretion rightly. No doubt, if the Court has gone beyond its jurisdiction, then a person aggrieved can apply; but that is not the present case. For these reasons I think the application fails, and that it must be dismissed with costs.

Solicitors: *Hunters & Haynes; Solicitor to the Board of Trade.*

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Nov. 21.

In re BLAZER FIRE LIGHTER, LIMITED.

[0092 of 1894.]

Company—Winding-up—Payment of Rates—Liquidator's Possession—Beneficial Occupation—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 138, 163.

The true test to be applied, in order to ascertain whether rates ought to be paid in full in respect of property of a company, possession of which has been retained by the liquidator, is that suggested by *Bowen* L.J. in *In re National Arms and Ammunition Company* (1):—whether there has been a "beneficial occupation" within the meaning of the rating statutes.

Therefore, where a caretaker is employed by the liquidator to take possession of the company's business premises and the plant thereon to prevent trespass and injury, though the business is not carried on and there is no intention to sell it as a going concern, there is a "beneficial occupation" in respect of which rates must be paid in full.

The test laid down by *Bacon* V.C. in *In re West Hartlepool Iron Company* (2) and that laid down by *Kay* J. in *In re Watson, Kipling & Co.* (3) (so far as it applies to rates) not adopted.

THE *Blazer Fire Lighter, Limited*, was a company which, on the 2nd of March, 1894, passed an extraordinary resolution in favour of voluntary winding-up and appointing a liquidator in the winding-up.

Part of the company's property consisted of a leasehold workshop and yard in *York Road, Islington*, where the company had carried on business. The business had ceased to be carried on before the winding-up, and was not continued by the liquidator. He, however, shortly after he was appointed, took possession of the premises and placed them in charge of a caretaker. According to the evidence of the liquidator in the proceedings mentioned below, the caretaker was placed in possession only to prevent trespass and injury; no profit, but expense to the company, resulted from retaining possession, and it was not intended to sell the business as a going concern, but, as soon as possible, to sell the premises and the plant thereon belonging to the company.

(1) 28 Ch. D. 474, 482. (2) 34 L. T. (N.S.) 568.
(3) 23 Ch. D. 500.

On the 24th of March, 1894, the vestry of *St. Mary, Islington,* made rates amounting to 2*s.* 10½*d.* in the pound, for the half-year ending the 29th of September, 1894, payable in two portions, on the 2nd of April and 2nd of July, 1894, and the rates were duly confirmed and allowed. The portion payable in respect of the company's premises in April was £3 2*s.* 4*d.*, and the portion payable in July was £3 4*s.* 2*d.*

On the 20th of June, 1894, an order was made restraining the vestry until further order from levying a distress on the company's property for rates made subsequent to the 2nd of March, 1894.

The plant and the caretaker remained on the premises till the 6th of September, 1894, when the whole of the property was sold.

The vestry applied to the Court to discharge the order made in June, 1894, and that the liquidator might be ordered to pay £6 6*s.* 6*d.*, or such damages as the Court should be of opinion that the vestry had sustained, and also to pay the costs of the vestry's application.

Chester Jones, for the Applicants:—

The vestry are entitled to payment of the rates in full, as the possession of the liquidator is a "beneficial occupation."

Where the liquidator occupies for the purposes of the company, and with a view to acquiring gain or avoiding loss to the company, the rates will be ordered to be paid in full: *In re National Arms and Ammunition Company* (1). In that case Lord Justice *Bowen* (2) doubted whether the test laid down by Vice-Chancellor *Bacon* in *In re West Hartlepool Iron Company* (3) was the true one, and suggested what is no doubt the true test, namely, whether there has been a "beneficial occupation" within the meaning of those words in cases as to rating; but the question was purposely left open.

If the test suggested by Lord Justice *Bowen* is the correct one, the liquidator must in this case pay in full, for a caretaker's occupation is a beneficial one within the meaning of the rating

(1) 28 Ch. D. 474. (2) 28 Ch. D. 482.
(3) 34 L. T. (N.S.) 568.

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statutes: *Hicks* v. *Dunstable Overseers* (1). The liquidator will probably rely on the decision of Mr. Justice *Kay* in *In re Watson, Kipling and Co.* (2); but that decision turned on special facts very different from those of the present case. No doubt it was referred to by the Court of Appeal in *In re National Arms and Ammunition Company* (3); but the decision of Mr. Justice *Kay* was neither overruled nor approved.

[He also referred to *In re International Marine Hydropathic Company* (4).]

J. G. Wood, for the liquidator:—

The question, according to *In re Watson, Kipling & Co.* (5), is, "whether in this case there has been such a beneficial occupation and enjoyment of the property as to induce the Court, in the exercise of its discretionary jurisdiction, to order these rates to be paid in full." Mr. Justice *Kay* apparently approved of Vice-Chancellor *Bacon's* test—viz., whether there has been something in the nature of enjoyment, besides mere possession or occupation—and held that where the liquidator has not made any profit, or attempted to make any, his possession is not a beneficial occupation (6).

The reference made by the Court of Appeal, in *In re National Arms and Ammunition Company* and *In re International Marine Hydropathic Company*, to *In re Watson, Kipling & Co.*, shews that the Court of Appeal did not intend to depreciate Mr. Justice *Kay's* decision in that case. The effect of the decisions is that beneficial occupation and merely keeping the premises *in statu quo* are not synonymous, but that something besides the latter is requisite to constitute the former.

If the contention of the Applicants is right, rates are always payable in full unless possession has been actually abandoned.

[He also referred to *In re Oak Pits Colliery Company* (7); *In re Lundy Granite Company* (8).]

Jones in reply.

(1) 48 J. P. 326.
(2) 23 Ch. D. 500.
(3) 28 Ch. D. 474.
(4) Ibid. 470.
(5) 23 Ch. D. 500, 505.
(6) Ibid. 508, 509.
(7) 21 Ch. D. 322.
(8) Law Rep. 6 Ch. 462.

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VAUGHAN WILLIAMS J.:—

I think the vestry are entitled to have the rates paid in full. In other words, they ought to be allowed to distrain for them, and I ought to discharge the order restraining them from so doing, and leave them to their rights on that basis.

There have been differences of opinion in the cases decided, and no amount of legal ingenuity could maintain that all the judgments which have been delivered could stand together. I give up that task myself as being too difficult. I adopt the view taken by Lord Justice *Bowen* in *In re National Arms and Ammunition Company* (1). No case later in date than that has been cited before me. I do not say that that case is a decision of the Court of Appeal in favour of the view I am about to take; but Vice-Chancellor *Bacon* had in *In re West Hartlepool Iron Company* (2), suggested that the test whether the rates were payable in full was whether there had been a beneficial enjoyment by the liquidator; and Lord Justice *Bowen*, in *In re National Arms and Ammunition Company*, said: "I wish to add that I am not satisfied that the test given by Vice-Chancellor *Bacon* in the case of *In re West Hartlepool Iron Company* is the true one. I am disposed to think that the true test is whether there has been a beneficial occupation within the ordinary meaning of those words in cases as to rating, and I wish to leave this question open, in case it should ever call for decision."

I intend to adopt that view, and I will state my reasons for so doing. The *Companies Acts* take away the power to make a distress on the property of a company after the commencement of a winding-up, but give the Court, in its discretion, power to allow the distress to go on. The question is whether the Court should allow it to go on in this case. It is admitted that the rate, in so far as it constituted a debt, was incurred after the liquidation and not before it, and therefore this is not a case in which it can be said that those who claim to be paid ought to come in and prove *pari passu* with creditors whose debts were incurred before the winding-up. If the vestry are creditors, they have become so since the commencement of the liquidation. And I cannot see why a debt in respect of rates should not be

(1) 28 Ch. D. 474, 482. (2) 34 L. T. (N.S.) 568.

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paid just as much as rent or anything else in respect of that which the liquidator acquires or uses after the liquidation has commenced.

If he takes new premises, he has to pay the rent in full. If he keeps up the old ones, he has also to pay. But whichever course he takes he has to pay the rates. Under the circumstances the test applied by Lord Justice *Bowen* is much the plainest and simplest. Here it is said that the liquidator occupied in a beneficial way within the meaning of the words in the rating statutes, and it cannot be disputed that he did.

Having said that, I wish to make one observation as to the effect of the decision of the Court, as distinguished from the observations of the judges, in *In re National Arms and Ammunition Company* (1). After the decision in that case it is impossible to say that *In re Watson, Kipling & Co.* (2) can stand as an authority, so far as it distinguishes the case of rent from that of rates. In *In re National Arms and Ammunition Company* all the Lords Justices decided the question before them on the basis that rents and rates were to be dealt with on the same principle. Even if this were a case of rent, Mr. *Wood* could not be heard to say that it would not be payable if the occupation of the premises were with the object of getting a good purchaser, and the premises were used in the meantime for the storage of the plant and machinery of the company. In support of such an argument he could not rely on *In re Watson, Kipling & Co.*, for there Mr. Justice *Kay* said (3): "I am not satisfied that the question of the payment of rates should be determined on absolutely the same principle as that of the payment of rent due to a landlord, because there is this difference, as was pointed out by Mr. *Rigby*, and I agree that it is a substantial distinction; in the case of a landlord the company occupying his property are keeping him out of possession, and if the company have, and deliberately exercise, enjoyment of the property of the landlord, no doubt the rent ought to be paid in full."

I should say Sir *Edward Kay* meant that if the liquidator chooses to occupy premises whilst waiting for a purchaser, he

(1) 28 Ch. D. 474. (2) 23 Ch. D. 500.
(3) 23 Ch. D. 507.

will have to pay the rent in full. Therefore Mr. *Wood* was not, in my judgment, entitled to rely on that case.

This case is really unarguable unless reliance is placed on the test applied by Vice-Chancellor *Bacon* in *In re West Hartlepool Iron Company* (1), that mere possessory occupation is not sufficient to render the liquidator liable. Having regard to subsequent cases that test no longer stands. In *In re Oak Pits Colliery Company* (2), Lord Justice *Lindley* says: "No authority has yet gone the length of deciding that a landlord is entitled to distrain for or be paid in full rent accruing since the commencement of the winding-up, where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessees." He does not, however, go the length of affirming the test of Vice-Chancellor *Bacon*.

If the liquidator deliberately chooses to occupy premises, and thinks that loss will be avoided by waiting before selling them, the rates ought to be paid in full.

The order of the 20th of June, 1894, must, therefore, be discharged.

Solicitor for Applicants: *William Lewis.*
Solicitors for liquidator: *H. & W. Priest.*

(1) 34 L. T. (N.S.) 568. (2) 21 Ch. D. 322, 331.

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Nov. 22, 23.

BLACK *v.* WILLIAMS.

[1894 B. 3313.]

Ship—Mortgage—Equitable Charge — Debenture — Registration — Priority — Notice—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 43, 69—*Merchant Shipping Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 3—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 33, 56, 57.

Sect. 3 of the *Merchant Shipping Act Amendment Act*, 1862 (re-enacted by sect. 57 of the *Merchant Shipping Act*, 1894) did not repeal any part, but only explained the meaning, of sect. 69 of the *Merchant Shipping Act*, 1854 (re-enacted by sect. 33 of the Act of 1894).

Therefore, although equitable interests in ships are recognised, a legal mortgage of a ship, in statutory form and registered, has priority over an equitable charge previously given, even where the legal mortgagee takes with notice of the charge.

THE *Victoria Steamboat Association, Limited*, was registered early in the year 1888, under the *Companies Acts*, 1862 to 1886, its objects, as stated in the memorandum of association, being (amongst others) "to carry on the business of steamboat owners," and to borrow money; to mortgage or charge all or any part of its property, including its uncalled capital; to issue debentures or other securities for money, and to vest all or any part of such property in any persons for the security of debenture-holders or other persons lending money to the company.

Clause 113 of the articles of association gave the directors power from time to time at their discretion to borrow money for the purposes of the company, and to secure the repayment thereof in such manner and upon such terms and conditions as they might think fit, and in particular by mortgage of, or charge upon, or the issue of debentures charged upon, the property of the company (both present and future), including its unpaid capital for the time being.

The borrowing of money, not exceeding £50,000 at any time, on debentures creating a first charge on the undertaking of the company was resolved upon at a meeting of directors held on the 26th of September, 1888, and at the end of that year, and in 1889, the company issued first mortgage debentures under its common

seal charging with the principal sums borrowed and the interest thereon "its undertaking and all its property, both present and future, and both real and personal, including its uncalled capital for the time being."

Each debenture was issued subject to conditions annexed. These conditions, so far as material to this report, were as follows:—

"1. This debenture is one of a series of debentures of the company for securing principal sums, not at any one time exceeding in the aggregate £50,000. All such debentures shall rank *pari passu*, one with the others, irrespective of the dates of their issue, as a first charge upon the undertaking and property of the company above mentioned, without any preference or priority one over another.

"2. The charge created by this debenture shall be a floating security, and accordingly the company may in the course of its business, and for the purpose of carrying on the same, use, employ, sell, lease, exchange, or otherwise deal with all or any part of its property hereby charged in such manner as the company may think fit. . . .

"3. Nothing herein contained shall authorize the creation of any mortgage or charge on any of the property for the time being of the company in priority to the charge hereby created."

By a debenture trust deed, dated the 8th of November, 1889, and made between the company of the one part and *A. E. Williams* and *S. J. Montagu* (thereinafter called "the present trustees") of the other part, after reciting that the company had issued debentures to secure part of the £50,000 and was desirous of issuing the balance, but that, in order to place such balance, it was necessary to further secure such balance in manner hereinafter appearing, and reciting, by reference to the first schedule, the form of the debentures already issued, and that the further debentures would be in like form save that reference to the trust deed would be placed thereon, it was witnessed that the company demised certain hereditaments and assigned the benefit of certain agreements to the present trustees.

Clause 4 of the deed provided that the company would at its

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own cost execute to the trustees a legal mortgage (to be afterwards duly registered) of each of the vessels or steamboats specified in the 3rd schedule thereto, and of every other vessel or steamboat which during the continuance of the security should be acquired by the company, to secure the payment of £50,000 and interest, and that such mortgages should, as regarded each of the scheduled vessels, be executed and registered forthwith, and, as regarded each of the after-acquired vessels, forthwith after the acquisition thereof.

By clause 5 the premises demised, assigned, and covenanted to be mortgaged, thereinafter called "the mortgaged premises," were to be held by the trustees, upon trust to permit the company and its assigns to hold and enjoy the same, and carry on therein and therewith the business authorized by the memorandum of association, until the security authorized by the trust deed became enforceable as thereinafter provided, and then upon trust, and with powers to take possession and sell.

By clause 11 the trustees were to hold the proceeds of sale upon trust, after paying costs and expenses, to apply the residue, first and secondly, in or towards payment of the arrears of interest and the principal sums due on the debentures, and, thirdly, in payment of the surplus to the company or its assigns.

By clause 16 the company was empowered, at any time before entry by the trustees, without their consent, to sell any of the vessels mentioned in the 3rd schedule, or to be thereafter acquired, notwithstanding any mortgage under clause 4, but as to any scheduled vessel at a price not less than the sum set opposite to the name of the vessel in the 3rd schedule. The trustees were to do all acts necessary for effectuating every such sale and vesting the property in the purchaser, and were to hold the proceeds upon the trusts thereinafter declared, which included a trust for purchasing other vessels.

Schedule 3 included, amongst other vessels, three steamships called the *Victoria*, the *Princess Beatrice*, and the *Queen of the Orwell*, all of which were, at the time of the execution of the trust deed, the subject of legal mortgages.

Early in January, 1891, the company was negotiating with the *Marine Securities Corporation, Limited*, with a view to a loan

from the corporation; and on the 13th of January, 1891, *A. E. Williams*, as managing director of the company, wrote to the secretary of the corporation sending him the memorandum and articles of association of the company, a copy of a valuation made by a Mr. *Black*, and a working account, and containing the following words:—

"From Mr. *Black's* figures it will be seen that the valuation, December 18th last, amounted to £150,318, and which will be increased by his further additions as mentioned in his further memorandum. The present issue of debentures amounts to only £50,000, at the date of which issue the large additions were not contemplated. The association, for the purposes of further development, are issuing a second series of debentures for £50,000 at 6 per cent., and for which it will be seen there is ample security. Since the first issue of debentures was dealt with, seven new vessels have been added and are running. There are new ones building at Messrs. *Samuda's*, and the *Lord of the Isles* will be shortly added . . . The association is desirous of raising further moneys by the further issue of debentures as above mentioned at 6 per cent. for five, seven, or ten years, either by their being taken absolutely at an agreed price or by a loan on the security thereof. We should like a sum of, say, £150,000, payable at dates to be mutually agreed upon."

On the 10th of June, 1891, the company entered into an agreement with the *Marine Securities Corporation*, whereby they agreed to execute a mortgage upon three steamers called the *Lord of the Isles*, the *Mermaid*, and the *Fairy Queen*. Clause 12 of this agreement was as follows: "The shipowners shall not whilst any money is owing on the security of these presents, without the consent in writing of the said mortgagees, execute any further mortgage except by way of second mortgage to the trustees for the debenture-holders, or any transfer of the said *Lord of the Isles* and *Mermaid* and *Fairy Queen*, or either or any of them, or execute any mortgage or charge upon any freight or passage-money of the said *Lord of the Isles* and *Mermaid* and *Fairy Queen*, or either or any of them." The last-named ship was the vessel which, in the 3rd schedule to the trust deed,

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was called *Queen of the Orwell*; but the other two ships were not in existence at the time when that deed was executed.

In accordance with this agreement, legal mortgages were, on the 10th of June, 1891, executed by the company, in favour of the corporation, on the *Lord of the Isles* and the *Mermaid*, and these mortgages were registered in *London*, the port of registry, on the 15th of June, 1891, and the 11th of August, 1891.

On the 26th of June, 1891, the mortgage on the *Fairy Queen* was transferred to the corporation, and this transfer was registered on the 18th of November, 1891.

In pursuance of another agreement dated the 27th of October, 1891, transfers of the registered mortgages on the steamships *Victoria* and *Princess Beatrice* were executed in favour of the corporation, and the transfers were registered about the 29th of October, 1891.

In pursuance of another agreement, similar mortgages were, on the 3rd of November, 1891, given by the company to the corporation on the steamships *Bismarck* and *Empress Frederick*, neither of which was scheduled to the trust deed, and these mortgages were registered on the 3rd of November, 1892.

In pursuance of an agreement contained in a letter, a mortgage was, on the 29th of September, 1893, given to the corporation on the steamship *Palm*, which was not in existence when the trust deed was executed, and this mortgage was registered on the 30th of September, 1893.

During the negotiations between the representatives of the company and the corporation with reference to the proposed loans from the latter, certain conversations took place in which it was assumed that the specific mortgages to the corporation would have priority over the debentures.

In accordance with the trust deed, the company executed, in favour of the trustees thereof, specific mortgages of the vessels referred to in the 3rd schedule, and of the vessels acquired after the execution of the trust deed; but the mortgages given or transferred to the corporation were all registered before the mortgages given by the company to the trustees.

In pursuance of a resolution passed by the directors on the 18th of November, 1891, the company borrowed a sum of

£50,000 on the security of a series of B mortgage debentures charging its undertaking and present and future property, including its uncalled capital, with certain sums, but subject to the deed of the 8th of November, 1889, and to the first mortgage debentures and the moneys, the payment whereof was thereby secured.

The company also issued certain C debentures.

In July, 1894, *Catherine Black*, on behalf of the holders of the first mortgage and B debentures, commenced an action against the trustees of the deed of the 8th of November, 1889, *P. B. Black*, a holder of C mortgage debentures, and the company, for a declaration that the holders of the first mortgage debentures were entitled to a first charge, and that the B mortgage debenture-holders were entitled, subject thereto, to a charge; to have the trusts of the deed of the 8th of November, 1889, carried into execution; and for accounts and incidental relief.

On the 19th of July, 1894, receivers and a manager of the undertaking and property of the company were appointed by an order made in the action.

On the 8th of August, 1894, the company was ordered to be wound up by the Court under the *Companies Acts*, 1862 to 1893.

Assuming that the corporation were entitled as first mortgagees in priority to the debenture-holders and their trustees, the corporation were under the powers in their mortgage deeds entitled to take possession of the vessels comprised therein; and they issued a summons asking that, notwithstanding the appointment of the receivers and manager, the corporation might be at liberty to take possession of the *Lord of the Isles*, the *Mermaid*, the *Fairy Queen*, the *Victoria*, the *Princess Beatrice*, the *Bismarck*, the *Empress Frederick*, and the *Palm*, and to sell the same, or otherwise exercise their powers as mortgagees thereof.

The summons was adjourned into Court and heard by Mr. Justice *Vaughan Williams* on the 22nd and 23rd of November, 1894.

Farwell, Q.C., and *W. Baker*, in support of the summons:—

The question of notice does not really arise.

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Even if the Applicants had notice of the debentures, their mortgages confer a legal title which has priority over the equitable title of the debenture-holders.

Under the *Merchant Shipping Act*, 1854 (sects. 30, 32, 33), a British ship is registered in "the register-book" at "her port of registry or the port to which she belongs," and changes of ownership must be registered; and by sect. 43 notice of a trust is not to be entered in the register-book, and, subject to the rights of any person appearing by the register-book, the registered owner has power absolutely to dispose, in manner thereinafter mentioned, of the ship or any share therein. A mortgage of a ship must be in a specified form, and must be under seal and attested (sect. 66); this mortgage must be produced to the registrar, who is to record it in the order of time in which he receives it (sect. 67); and if more mortgages than one are registered, the mortgagees, "notwithstanding any express, implied, or constructive notice," have priority over one another according to the date of registration, and not of each instrument itself (sect. 69). It was held, under sect. 69, that the Court could not recognise equitable titles: *Liverpool Borough Bank* v. *Turner* (1).

In consequence of that decision, the Legislature passed sect. 3 of the *Merchant Shipping Act Amendment Act*, 1862, which compels the Courts to recognise equitable titles by notice, but does not prefer them to legal titles. That section only interprets the Act of 1854. Sect. 69, therefore, must be now read as if sect. 3 of the Act of 1862 were incorporated with it; but the words "notwithstanding any express, implied, or constructive notice" have still full force. This interpretation of the clauses of the two Acts has received legislative sanction, for by sects. 56 and 33 of the *Merchant Shipping Act*, 1894, which will come into operation on the 1st of January, 1895, sects. 43 and 69 of the Act of 1854 are re-enacted, and sect. 57 of the Act of 1894 is a re-enactment of sect. 3 of the Act of 1862. "The policy of the Act is, that a true statement of the incumbrances should appear upon the register": *Bell* v. *Blyth* (2).

(1) 1 J. & H. 159; on appeal 2 D. F. & J. 502.
(2) Law Rep. 4 Ch. 136, 141.

Registration of a ship is analogous to that of land in a register county, in which case priority of registration is only affected by the existence of actual fraud: *Le Neve* v. *Le Neve* (1); *Wyatt* v. *Barwell* (2); 47 & 48 Vict. c. 54, s. 14.

But the Applicants never had notice that the debentures affected these ships. The mere fact of their knowing that debentures had been issued would not stand in the way of their taking a mortgage which would override the debentures: *Wheatley* v. *Silkstone and Haigh Moor Coal Company* (3). Nor were they affected with constructive notice or put upon inquiry: *English and Scottish Mercantile Investment Company* v. *Brunton* (4).

Such information as the Applicants had was to the effect that the debentures did not affect these ships. If inquiry had been made, it would not have satisfied the Applicants that the debentures would take priority over a statutory mortgage.

Alexander, Q.C., and *Dundas Gardiner*, for the debenture-holders:—

The title of the Applicants to the ships in respect of which they took transfers of mortgages registered before execution of the trust deed is not disputed.

Sect. 69 of the Act of 1854, being inconsistent with sect. 3 of the Act of 1862, is partially repealed by the subsequent enactment: *Hardcastle* on the Construction of Statutes (5); *Stapleton* v. *Haymen* (6).

Sect. 3 is wide enough in its terms to include all equities, and therefore so far repeals or amends sect. 69 as to compel the Courts to recognise equitable rights which would be enforceable if the subject-matter had not been ships but some other kind of personal property. The words "notwithstanding any express, implied, or constructive notice" in sect. 69, though still in force as between two legal mortgagees, are so qualified by the later enactment as to give the equitable title priority over a subsequent legal mortgagee with notice, though he has completed his legal title by a registration prior in date to that when the

(1) Amb. 436; 2 W. & T. L. C. 6th Ed. p. 26.
(2) 19 Ves. 435, 439.
(3) 29 Ch. D. 715.
(4) [1892] 2 Q. B. 700.
(5) 2nd Ed. p. 345.
(6) 2 H. & C. 918.

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equitable mortgagee registered his completed mortgage. There is no analogy between ships and land, the title to which has to be registered. Sect. 3—which says that equities are to be enforced against ships as if they were any other personal property—refers to such other personalty as Consols or shares in a company.

Even in the case of land in a register county, constructive notice is sufficient to prevent priority by previous registration: *Wormald* v. *Maitland* (1). The Applicants do not stand in the position of purchasers with notice taking their title from a mortgagee who had not notice, as in *The Celtic King* (2). Having notice that there were debentures affecting the ships, they were put on inquiry as to how far they did so.

[*Farwell*, Q.C.:—The Applicants admit they knew the debentures were a charge on the ships then in existence, and do not suggest that any misrepresentation was made to them.]

The Applicants cannot rely on statements made as to the effect of the debentures: *English and Scottish Mercantile Investment Company* v. *Brunton* (3). The case does not come within the second class of cases mentioned by Vice-Chancellor *Wigram* in *Jones* v. *Smith* (4), because neither fraud nor wilful abstention from inquiry is charged. But an intending mortgagee who knows of the existence of prior charges and makes no inquiry comes within the first class of cases referred to by the Vice-Chancellor: *Patman* v. *Harland* (5). The cases on which the Applicants rely were not decided on questions of priority.

Upjohn, and *Solomon*, for the trustees of the debenture trust deed.

P. F. S. Stokes, for the liquidator.

Farwell, in reply:—

Wormald v. *Maitland* was overruled by *Agra Bank* v. *Barry* (6). The true effect of sect. 69 of the Act of 1854 and sect. 3 of the Act of 1862 is shewn by *Hughes* v. *Sutherland* (7).

(1) 35 L. J. (Ch.) 69.
(2) [1894] P. 175.
(3) [1892] 2 Q. B. 700.
(4) 1 Hare, 43, 55.
(5) 17 Ch. D. 353.
(6) Law Rep. 7 H. L. 135.
(7) 7 Q. B. D. 160.

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This is a summons by mortgagees of ships claiming under mortgages which are in the statutory form, and the registration of which was prior in time to the registration of mortgages in the statutory form under which the debenture-holders under a trust deed executed by the mortgagors claim. Some of the Applicants' mortgages are, however, subsequent in point of time to the issue of the debentures under which the debenture-holders claim; and the question which I have to decide is a question of priority, namely, whether the title of the Applicants under the mortgages which I have mentioned does or does not take precedence over that of the holders of the debentures which, at a date prior to the registration of the mortgages, were issued by this company.

The first point which I have to consider arises on the construction of the *Merchant Shipping Acts*. The *Merchant Shipping Act*, 1854, s. 43, says: "No notice of any trust, expressed, implied, or constructive, shall be entered in the register-book, or receivable by the registrar; and, subject to any rights and powers appearing by the register-book to be vested in any other party, the registered owner of any ship or share therein shall have power absolutely to dispose in manner hereinafter mentioned of such ship or share, and to give effectual receipts for any money paid or advanced by way of consideration."

When that section and the Act of Parliament which contains it were first construed in *Liverpool Borough Bank* v. *Turner* (1), it was held that the Courts could in no way recognise equitable titles. That was not a case in which any question of priorities was raised. The owners of a ship had given a letter, which in equity would have created a charge on some vessels belonging to them. After they had become bankrupt the question arose whether any effect could be given to that letter as against the assignees in bankruptcy of the shipowners, and it was held that no effect whatever could be given to the letter, but that the effect of the 43rd section and the other sections of the Act of 1854 was that equitable titles could not be recognised.

The commercial world regarded that decision as a great

(1) 1 J. & H. 159; on appeal 2 D. F. & J. 502.

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hardship; and in the result the Legislature, by enacting sect. 3 of the *Merchant Shipping Act Amendment Act*, 1862, gave effect to the view of the mercantile community, and in effect provided that equitable titles should be recognised.

That provision was not a statement of the law which was to prevail in future, but the section declared what had been the state of the law under sect. 43 of the Act of 1854 as it originally stood. It did not profess to create a new law, but it did profess to declare what was the true meaning of the Act of 1854 as it was passed.

Now, sect. 3 of the Act of 1862 runs thus: "It is hereby declared that the expression 'beneficial interest,' whenever used in the second part of the principal Act, includes interests arising under contract and other equitable interests; and the intention of the said Act is that, without prejudice to the provisions contained in the said Act for preventing notice of trusts from being entered in the register-book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees"—all those words refer to the 43rd section of the Act of 1854—"and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships"—that refers to the 18th section, I think, taken in conjunction with the 38th and 39th sections—"equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property."

Before dealing with the contentions of counsel as to the construction of that section, I wish to say that the words with regard to "beneficial interest," which at first sight seem difficult to account for, are easily accounted for when one looks at the argument which was addressed to the Court in *Liverpool Borough Bank* v. *Turner* (1), and the judgments of the Vice-Chancellor *Page Wood* and the Lord Chancellor (Lord *Campbell*) in that case.

It is quite plain that, the question being whether the Court could recognise equitable interests, Sir *John Rolt* had called

(1) 1 J. & H. 159; on appeal 2 D. F. & J. 502.

attention to sects. 18, 38, and 39 of the Act of 1854, which did make use of that term, and had argued that it was impossible to say that the statute did not intend to recognise equitable interests, because in these sections it seemed expressly so to do.

That argument, whether good or bad, did not prevail with the Vice-Chancellor or the Lord Chancellor. They both thought that, notwithstanding those words, the true effect of the statute was to prevent any effect being given to equitable interests.

Having said that, I will deal with the arguments of counsel in this case as to the effect of sect. 3 of the Act of 1862. It is not in dispute that equitable interests are now to be recognised; but in effect, Mr. *Alexander's* argument is that equitable interests in ships, and legal interests under mortgages in the statutory form and registered in the way contemplated by the statute, are to be put upon an equality, and that, at all events, if they are not put upon an equality, any priority or advantage which a registered mortgage in the statutory form would get over a mere equitable mortgagee is to be disregarded if the statutory mortgagee had, at the time when he acquired his interest, express, implied, or constructive notice of the title of the equitable mortgagee.

In considering which of these two conclusions is right, I have to examine sect. 69 of the Act of 1854; but before I deal with the very words of that section I must state the principle upon which I ought to construe the 3rd section of the Act of 1862. Having regard to the fact that that section is merely a declaration of the meaning of a prior enactment, I ought to read the 3rd section exactly as I should have read it if it had been in terms introduced into the statute of 1854 as declaring the meaning of that statute in its initiation. That being so, I am of opinion that I am bound to give some effect to the 69th section, because it is perfectly impossible to suppose that the Legislature could have passed an Act of Parliament and introduced into it two sections with the intention that one should absolutely nullify the other. If I am right in saying that the 3rd section of the Act of 1862 is to be dealt with and construed as if it had appeared in the Act of 1854, it is absolutely impossible that I should put a construction upon that 3rd section which would nullify any one section in the Act of 1854. Not only is it

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impossible that I should put that construction upon the 3rd section of the Act of 1862 (I mean the construction that it should nullify any section in the Act of 1854); but I cannot and ought not to read sect. 3 so that it should nullify or prevent effect being given to one single word in any section of the Act of 1854. I am bound, therefore, to give effect to every word in the 69th section.

It is quite true that, in giving effect to the words of sect. 69, I must not forget or leave out of notice that there is the 3rd section of the Act of 1862. On the contrary, I am bound to read the 69th section of the Act of 1854 in the light of the 3rd section of the Act of 1862, though I am bound to give effect to every word of sect. 69. That section says that, "If there is more than one mortgage registered of the same ship or share therein, the mortgagees shall, notwithstanding any express, implied, or constructive notice, be entitled in priority one over the other, according to the date at which each instrument is recorded in the register-books, and not according to the date of each instrument itself." Now, Mr. *Alexander* naturally was unwilling to say that his argument involved a contention on his part that the 69th section was repealed. He said that his argument was not inconsistent with an effect being given to the 69th section. When I pressed him as to what effect could be given to it, he and his learned junior both gave an effect to the 69th section which entirely ignored the words "notwithstanding any express, implied, or constructive notice." They are asking me not to give priority to the Applicants by disregarding the words "notwithstanding any express, implied, or constructive notice," but to regulate the priorities because of the fact of notice expressed, implied, or constructive having been given.

According to my view, it is impossible that I should do that. It seems to me that the 69th section is a living section, that every word of it is a living word, and that I must give effect to it. Then it was said: "Give effect to the section in the case of legal mortgages, but do not give effect to it in the case of equitable mortgages. Give effect to it when legal mortgages are in competition, but not where you have a legal mortgage and an equitable mortgage in competition." It is impossible to put

such a construction upon an Act of Parliament. To do so would be to say that it was better to possess an equitable title than a statutory legal title; and I do not believe that the Act of Parliament meant or could have meant anything of the sort. Under these circumstances I have come to the conclusion that, although sect. 3 of the Act of 1862 was intended to declare that the Act of 1854 did not ignore and did not intend that the Court should ignore equitable titles, it nevertheless did intend that all the provisions of the Act of 1854 with regard to the registration of titles and the priority of unregistered titles should have effect given to them. That is my conclusion. I recognise, as I am bound to do, the equitable title of the debenture-holders; but I say that that equitable title is controlled by the plain words of that part of the Act of 1854 which relates to mortgages, beginning with sect. 66 and ending with sect. 75. I hold, therefore, that the title of the Applicants, who have got a mortgage in the statutory form which has been registered, is to be preferred to the title of the debenture-holders, who, having a prior equitable title, and being entitled to get that converted into a legal title in the statutory form and registered, chose not to do so. There is no hardship whatever in such a decision. The Act of Parliament was passed for the benefit of commerce, and in order that English ships might be easily dealt with by English shipowners. The Legislature has recognised that occasions arise when it is to the interest of the whole community that people should be able to raise money on ships by sale or mortgage, and in the interests of the general public it has therefore provided that registered titles in the statutory form shall have a priority, thus enabling those who are disposed to purchase or lend money upon ships to do so with perfect confidence that their titles will not be overridden by priority being obtained by equitable unregistered titles which happen to be prior in point of time, and which, for reasons of their own, the owners of those equitable titles have not thought fit to convert into the legal form, or to register in the way pointed out by the statute.

Solicitors: *Gresham, Davies, & Dallas; H. Montagu; Parker, Garrett, & Parker; E. O. Goss.*

F. E.

C. A.
1894
STIRLING J.
Oct. 25;
Nov. 14.
C. A.
1895
Jan. 22.

In re HUME.
FORBES *v.* HUME.

[1894 H. 1275.]

Will—Gift to Charity—Mortmain—Reversionary Interest in Land—Mortmain and Charitable Uses Act, 1888 (51 & 52 *Vict. c.* 42), *s.* 4—*Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *ss.* 3, 5.

A testatrix, who died in 1892, devised her reversionary real estate to certain persons for life with remainder to a charity:—

Held (affirming the decision of *Stirling* J.), that the gift of the reversionary interest to a charity was valid.

Sect. 4 of the *Mortmain and Charitable Uses Act*, 1888, so far as it applies to wills, is inconsistent with and repealed by sect. 5 of the *Mortmain and Charitable Uses Act*, 1891, but remains in force so far as it is applicable to deeds.

CHARLOTTE HUME, by her will, dated the 24th of October, 1890, gave her residuary real and personal property to her husband, *F. W. Hume*, during his life, and after his death, subject as to parts thereof to certain life interests, to trustees upon trust either to allow the same to remain in its actual state of investment, or to convert the same into money, and to stand possessed of the same, and the proceeds thereof, subject to certain other life interests, upon trust that the whole of such property, or such part or parts thereof as might be lawfully applicable for the purpose, should go and belong to the charity known as the *Croydon Rescue and Preventive Association*, and in case such charity should have ceased to exist, then to the *Croydon Hospital*; and subject as aforesaid she declared that the said residuary estate, and the income thereof and the investments thereof, should be in trust for *Christina C. Forbes* absolutely.

The testatrix died on the 6th of March, 1892, possessed of considerable real and personal property. Her husband, *F. W. Hume*, and some others entitled to life interests, were still living.

A summons was taken out by *C. C. Forbes* to obtain the opinion of the Court as to the validity of the gift of the residuary real estate after the death of *F. W. Hume* and the other tenants for

life to the two charitable institutions, and whether, if the Court should be of opinion that the gift was valid, the time for the sale thereof should be extended (1).

The summons was heard before Mr. Justice *Stirling* on the 25th of October, 1894.

Hastings, Q.C., and *Alexander Young*, for the Plaintiff:—

The gifts in favour of the charities fail, as to the real estate comprised therein, and the trustees hold such real estate in trust for the Plaintiff under the ultimate gift in remainder contained in the will.

(1) The clauses in the Acts of 1888 and 1891 specially referred to in the argument, were as follows:—

51 & 52 Vict. c. 42, s. 4: "(1.) Subject to the savings and exceptions contained in this Act, every assurance of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this Act, and unless so made shall be void.

"(2.) The assurance must be made to take effect in possession for the charitable uses to or for the benefit of which it is made immediately from the making thereof.

"(3.) The assurance must, except as provided by this section, be without any power of revocation, reservation, condition, or provision for the benefit of the assuror or of any person claiming under him."

"(6.) If the assurance is of land, not being land of copyhold or customary tenure, or is of personal estate, not being stock in the public funds, it must be made by deed executed in the presence of at least two witnesses."

Sect. 10. "In this Act, unless the context otherwise requires:—

"(i.) 'Assurance' includes a gift, conveyance, appointment, lease, transfer, settlement, mortgage, charge, incumbrance, devise, bequest, and every other assurance by deed, will, or other instrument; and 'assure' and 'assuror' have meanings corresponding with assurance."

"(iii.) 'Land' includes tenements and hereditaments corporeal and incorporeal of whatsoever tenure, and any estate and interest in land."

54 & 55 Vict. c. 73, s. 3: "'Land' in the *Mortmain and Charitable Uses Act*, 1888, and in this Act, shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land; and the definition of land contained in the *Mortmain and Charitable Uses Act*, 1888, is hereby repealed."

Sect. 5: "Land may be assured by will to or for the benefit of any charitable use, but, except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any Judge thereof sitting at Chambers, or by the Charity Commissioners."

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In the report of *In re Bridger* (1), upon which the charities may possibly rely, it does not appear whether *Ann Bridger*, the owner of the life interest, was living or not. We have ascertained that she was living; but the present point was not raised or mentioned in that case, and the only question there was as to the meaning of the words in the will, "which may by law be given for charitable purposes."

[STIRLING J.:—The decision ought to be treated according to the true state of the facts.]

In any case, as this point was the subject neither of argument nor decision, it cannot be treated as an authority binding on the Court so as to conclude the present question. Under the law of mortmain in force on the 24th of October, 1890, the date of the will, the disposition in favour of the charity would have failed as to such part of the residuary estate as consisted of land; but it is contended that the gift can take effect under sect. 5 of the Act of 1891. That section, however, provides that land assured by will for the benefit of any charitable use must be sold within a year from the death of the testator, unless the period be extended in manner therein mentioned. This shows that the Legislature only contemplated an immediate gift by will to a charitable use, and that a reversionary gift is not within the statute. The conditions under which, according to sect. 4 of the Act of 1888, assurances to charitable uses may be made still remain in force, although, by the Act of 1891, another mode of assurance, *i.e.*, by will, is made lawful, subject to the provisoes therein contained.

Dibdin, for the *Croydon Hospital*:—

The conditions imposed by the Act of 1888 do not apply to the testamentary mode of assurance introduced by the Act of 1891. For instance, sub-sect. 7 of sect. 4 enacts that an assurance of land in favour of a charity "must be made at least twelve months before the death of the assuror."

Buckley, Q.C., and *Eve*, for the *Croydon Rescue and Preventive Association*:—

Although the question does not appear to have been raised in

(1) [1893] 1 Ch. 44.

In re Bridger (1), that case covers the present in point of principle. The subject of this gift is an interest in land, and under the Act of 1891 any interest in land may be assured by will. Under the definition clause "land" includes "hereditaments of any tenure." Why should a reversionary interest in land be excluded? It could be sold like any other interest. The Act of 1891 was a new departure, and only such of the old safeguards as were thought necessary were preserved. The effect of the Act was that the gift of land by will was to be good, but it was to take effect as money and not as land: *Wickham* v. *Marquis of Bath* (2); *Doe* v. *Lloyd* (3); *Milbank* v. *Lambert* (4); *Tudor* on Charitable Trusts (5); *Bristowe* on the *Mortmain Acts* (6).

Mulligan, for the trustees.

Hastings, in reply.

Cur. adv. vult.

1894. Nov. 14. STIRLING J.:—

This is an originating summons asking the opinion of the Court whether, on the true construction of the will of the testatrix, the freehold and copyhold property forming her real estate, and thereby devised, and the investments and proceeds of sale thereof, will, on the determination of the respective life interests, go by the will to certain beneficiaries. The question is whether assurances of land by will to or for the benefit of a charitable use, under sect. 5 of the *Mortmain and Charitable Uses Act*, 1891, are subject to any of the restrictions contained in sect. 4 of the *Mortmain and Charitable Uses Act*, 1888, and particularly to those imposed by sub-sects. 2 and 3 of that section.

Part 2 of the Act of 1888 (which begins with sect. 4) is in substance a re-enactment of the Act of 9 Geo. 2, c. 36, intituled "An Act to restrain the disposition of lands whereby the same became unalienable." The Preamble to the Act of Geo. 2 is in these terms: "Whereas gifts or alienations of lands, tenements

(1) [1893] 1 Ch. 44.
(2) Law Rep. 1 Eq. 17.
(3) 5 Bing. N. C. 741.
(4) 28 Beav. 206.
(5) 3 Ed. p. 391.
(6) Page 2.

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or hereditaments, in Mortmain, are prohibited or restrained by *Magna Charta*, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless this publick mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called Charitable Uses, to take place after their deaths, to the disherison of their lawful heirs." Then sect. 3 of that Act prohibited all gifts and grants of land or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting lands or hereditaments, or of any personal estate to be laid out or disposed of in the purchase of any lands or hereditaments, or of any estate or interest therein, or of any charge or incumbrance thereon, to or in trust for any charitable uses whatever; except in the manner and form by the Act directed, being by deed satisfying certain requirements therein prescribed.

The policy of the Act is thus explained by Lord Justice *James* in delivering the judgment of the Court of Appeal in the case of *Attree* v. *Hawe* (1), and I cannot do better than read a short passage from that judgment: "It had from the earliest times been the policy of the Common Law as interpreted by the Judges to discourage the inalienability of land, and this altogether irrespective of the peculiar mischiefs supposed to arise from the vesting of lands in mortmain, which deprived the Sovereign and the Lords of the profitable incidents of feudal tenures. And this policy in more modern times approved itself to the Legislature. It was deemed in itself a mischief that lands should be rendered inalienable, and the Legislature found that this mischief was being mischievously increased in one particular way—that is to say, it was found that dying persons were, sometimes from spontaneous weakness, and sometimes from their readiness to yield to the many influences which can be brought to bear on persons *in extremis*, too easily minded to give lands to charitable uses (words of the widest signification), and to be posthumously benevolent at the expense of their lawful heirs. And this was the mischief, and the sole mischief, which the Legislature set itself to prevent, viz., to prevent the increase of inalienable land

(1) 9 Ch. D. 337, 345.

through the weakness of or practices upon dying persons, or through posthumous charity. And upon examination of the enactments it will be found that the Act is in entire consistency with the recital. In the Act there is no prohibition of gifts of land by deeds *inter vivos*, but there are regulations securing that such gifts shall not be in substance posthumous merely by avoiding the form. There is no prohibition of any amount of testamentary charity confined to pure personal property. But the Act does in the most comprehensive terms forbid any such testamentary or posthumous charity as to any interest in land or other real estate, or as to any charge or incumbrance affecting the same. At first sight it may seem that the enactment has gone far beyond the scope of the recited object, for it extends, as has always been held, even to a pecuniary legacy, so far as it is payable out of land or any charge or incumbrance on land. But it will be found on examination that all the comprehensive words in the prohibitory enactment were in truth necessary or useful to prevent evasions and devices contrary to the main intent of the Act, although from the impossibility of legislating for every particular case they have been found to apply in a great many cases to gifts which were neither in effect or intention contrary to the real object of the Legislature."

The result has been that, while ever since the passing of the Act testators have enjoyed unrestricted power of giving by will to charities personal estate unconnected with land (or as it is often called pure personal estate) of any amount (so long as the dispositions did not involve in the execution of them the purchase of land or interests therein or incumbrances thereon), the Courts have enforced with great strictness the provisions of the statute in the case of attempted testamentary dispositions of personal estate consisting of interests in land, or charges or incumbrances thereon, commonly termed impure personal estate. Considerable difficulty has arisen in many cases in determining whether particular kinds of personal estate fall within one class or the other. Reported decisions (some of recent date) shew how narrow is the line which divides the two classes. Gifts of pure personal estate have been held invalid where the connection with land was extremely remote, and Judges of great eminence have

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expressed their astonishment at the great extent to which the Act has been carried: see, for example, the judgment of the present Master of the Rolls in *Ashworth* v. *Munn* (1).

The Act of 1891 appears to have been passed with the object of restraining within narrower limits the application of the prohibitory legislation of 9 Geo. 2, c. 36. By sect. 3 the definition of land contained in the Act of 1888 is altered so as to exclude from it money secured on land, and other personal estate arising from and connected with land: and all such personal estate has ceased to be subject to the restrictions originally imposed by the Act of Geo. 2, and continued by that of 1888. Again, sect. 7 renders valid bequests in favour of charities of personal estate to be laid out in the purchase of land. It provides that such bequests shall be held to or for the benefit of the charitable use as though there had been no direction to lay out the personal estate in the purchase of land.

The question in the present case arises on sect. 5, which provides that "land may be assured by will to or for the benefit of any charitable use," words which, in themselves, appear to me to confer the widest power of testamentary disposition of land in favour of charities: that is to say, to enable testators to devise land in favour of charities for any estate or interest therein. The section goes on to provide that such land shall, notwithstanding anything in the will contained, be sold within one year from the death of the testator, or such extended period as may be determined by the Court or the Charity Commissioners; and sect. 6 provides that, so soon as the time limited for the sale of any lands by any such assurance shall have expired without completion of the sale, the land unsold shall vest forthwith in the official trustee of charity lands. These enactments (like the concluding provision of sect. 7) appear to be directed to the prevention of the mischief pointed out in the judgment of *Attree* v. *Hawe* (2), namely, the increase of inalienable land by means of charitable gifts; and, so far as I can see, the remedy thus provided by the Legislature is perfectly adequate for that purpose.

I must now examine the words of sect. 4 of the Act of 1888.

(1) 15 Ch. D. 363, 371. (2) 9 Ch. D. 337, 345.

That section requires that all assurances under it shall be by act *inter vivos*—"Subject to the savings and exceptions contained in this Act, every assurance of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this Act, and unless so made shall be void." The requirements there referred to are contained in the following sub-sections of sect. 4. I need only read sub-sects. 6 and 7. [His Lordship read those sub-sections, and continued :—]

These sub-sections effect the main object of the Act, namely, the prohibition of charitable gifts of land otherwise than by act *inter vivos*. It was conceded in argument that sub-sect. 6 is impliedly repealed by sect. 5 of the recent Act. It was said, however, that this repeal by implication does not extend to the other sub-sections, and in particular to sub-sects. 2 and 3, and that the testamentary assurance authorized by sect. 5 of the Act of 1891 must satisfy the requirements of those sub-sections. These, however, are merely subsidiary to the attainment of the object aimed at by sub-sect. 6. They are, in the language of Lord Justice *James*, regulations securing that charitable gifts *inter vivos* "shall not be in substance posthumous merely by avoiding the form," and naturally fall with the removal of the restriction imposed by sub-sect. 6. If, indeed, the Act of 1891 had omitted to provide any remedy for the mischief which the provisions of the Act of 1888 were intended to prevent, there might be ground for placing a limited meaning on the wide terms of sect. 5; but, where a new and apparently adequate remedy is afforded, I fail to see why that section should be read in a narrower sense than its language warrants.

The statutory provision that land assured by will in favour of charities ought to be sold within one year from the death of the testator is relied on as shewing that an estate or interest so assured must take effect in possession within that period. I am, however, unable to follow that argument. A future interest in land may be sold no less than an immediate interest. Moreover, a sale within a year is not absolutely imperative. The Legislature recognises that, in particular cases, reasons may exist which

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render a sale within that time undesirable, and has provided the means for extending the term.

For these reasons, I think that the charitable gifts contained in the will of the testatrix are valid.

I may add that in point of decision the present case is covered by *In re Bridger* (1), because there, as here, the dispositions in favour of the charities were not immediate but future. Inasmuch as the question discussed before me does not appear to have been raised in argument, and is certainly not expressly dealt with in the judgment delivered in *In re Bridger*, I have thought it right to express my opinion upon it, without relying on that case as an authority. At the same time I find great difficulty in supposing that if the contention of the present Plaintiff had any solid foundation, it would have entirely escaped the attention of all the learned Judges before whom *In re Bridger* was argued.

W. W. K.

C. A. The Plaintiff, *C. C. Forbes*, appealed from this decision. The appeal was heard on the 22nd of January, 1895.

Hastings, Q.C., and *Alexander Young*, for the Appellant:—

The restrictions placed upon assurances of land to charitable uses imposed by sect. 4 of the Act of 1888 became applicable to gifts by will as soon as such gifts were made lawful by the Act of 1891. A will is an assurance within the definition contained in sect. 10 of the Act of 1888. Sect. 4 of the Act of 1888 ought to be read now as if the words "or by will" were introduced. Therefore, by sub-sect. 2, a gift by will must take effect in possession for the charitable uses intended: and by sub-sect. 3, there must be no reservation or provision for the benefit of the assuror or any person claiming through him. Both these conditions are violated if a testator devises land to a tenant for life with remainder to a charity.

But the present gift is also void under the terms of the Act of 1891. There is no power under that Act to devise a reversionary interest. The definition of land in the 10th section of the Act of 1888 is entirely repealed by the 3rd section of the

(1) [1893] 1 Ch. 44; [1894] 1 Ch. 297.

Act of 1891, and a new definition given, in which the words "any estate and interest in land" are omitted. That shews the intention of the Legislature that only the land in possession should be devised, and not a particular estate or interest in it. And the same is clear from the 5th section, which provides that the land should be sold within a year, which cannot be done if the charity has only a reversionary interest, or other limited interest, in it.

Mulligan, for the trustees.

Dibdin, for the *Croydon Hospital*:—

A reversionary interest is "land" within the meaning both of the Act of 1888 and the Act of 1891. Under the old *Mortmain Act*, such an interest could always be conveyed for the benefit of a charity by deed enrolled, and there was no intention to alter that power by either of the recent Acts. A reversion will pass under a devise of land, and there was no need to insert the words "any estate in land" in the definition in the Act of 1891. The Act of 1891 was a new departure, and altered the whole policy of the law respecting devises of land to charity. It would therefore be unreasonable to apply to it the restrictions enacted by sect. 4 of the Act of 1888. With respect to the sale of the land in obedience to sect. 5 of the Act of 1891, there would be no difficulty in selling the reversion at once, or else the Court would give leave to postpone the sale till the death of the tenants for life.

Buckley, Q.C., and *Eve*, for the *Croydon Rescue and Preventive Association*:—

If the restrictions in the 4th section of the Act of 1888 apply to gift by will this devise is valid. The interest in the land given to charitable uses is vested and unconditional; that is what is meant by being in possession. It would be absurd to say that a man who had only a reversionary interest in land or an equity of redemption in land, of which the mortgagee was in possession, could not convey or leave it to charity. Nor has the testator reserved anything to any person claiming under him

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out of the interest devised. But we say that the restrictions placed upon assurances by the Act of 1888 have no application to gifts of land by will. The mischief which was struck out by the old *Mortmain Act* and by the Act of 1888 is now avoided in a totally different way, namely, by directing that all land devised to charities must be turned into money. If, therefore, the restrictions in the Act of 1888 can be construed as applying to devises, those restrictions are now repealed by implication. With respect to the objection that the words "estate and interest" which are contained in the old definition of land in the Act of 1888 which is repealed, are not repeated in the new definition in the Act of 1891,—the word "interest" was probably omitted because it might have been supposed to include money secured on land, which would have been inconsistent with the latter part of the section. It was unnecessary to insert the word "estate" for no one can hold land without having an estate in it, or can convey land without conveying an estate in it.

Hastings, in reply.

LORD HALSBURY :—

This is an appeal from an order of Mr. Justice *Stirling*, in which it is declared that the devise of real estate in the will of *Charlotte Hume*, after the death of certain tenants for life, to the *Croydon Rescue and Preventive Association*, and, in case such charity should have ceased to exist, then to the *Croydon Hospital*, is a valid devise. That is the part of the learned Judge's order against which this appeal is directed; and it appears to me, after a full consideration of this matter, that the question practically depends on the simple construction of sect. 5 of the *Mortmain and Charitable Uses Act*, 1891.

Now, the state of the law in 1888 was reduced to this condition of things—that practically that which the Legislature dealt with then was the inalienability of land; and one knows historically that from the earliest period when the *Mortmain Acts* were passed, various ingenious devices by learned persons were invented for the purpose of evading them. Money was left for

the purpose of building a school for example. It was money, and the object, that of building a school, was a very wholesome object, and a very proper one. Nevertheless, the Courts saw through the object of it, and as they could not build a school without land, they held that to be within the *Mortmain Act*. I need not go through the long series of cases with which one is familiar, and the various ingenious devices that have been used from time to time to turn money, which it was always lawful to leave, into land; but in the year 1888 the Legislature consolidated the law on that subject, and dealt with the only mode by which land could be alienated for charitable purposes, namely, by deed. From the first and second parts of the statute they excepted certain pieces of land which might be disposed of, and to which, therefore, speaking broadly, the *Mortmain Acts* did not apply. These were pieces of land given for public parks, school houses and museums; but it left the law in that condition of things that the *Mortmain Acts* did not apply to those excepted cases, and, accordingly, for the purpose of those excepted cases, it was necessary to introduce the word "will," and to make an assurance to include wills: and that is the reason why in the statute of 1888 are found the words "will" and "codicil." Otherwise it would have had no relation to wills at all; and in no respect could the question of a will have arisen except with regard to those excepted cases. So stood the law in 1888, and accompanying the power making land applicable to charitable purposes there were a great variety of restrictions not necessary to enumerate now. But then came the Act of 1891. The Act of 1891 seems to me to have inverted the whole condition of things. The state of the law and the current of decisions practically said this—"Do what you like, adopt whatever ingenious device you choose, but if the money you are going to leave is to be turned into land it shall be within the *Mortmain Act*." In 1891 the Legislature appears to have considered this. They determined to get rid of all these difficulties and to allow persons to devise lands as much as they pleased for charitable purposes, but they would more effectively get rid of the real objection, namely, the inalienability of land given to charity, by providing that while any one may make such a disposition as

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he pleases, when he has done it, the land shall within twelve months be turned into personalty. By that alteration of the whole course of the law the Legislature have attempted to provide against the difficulty which the idea of the inalienability of land had presented to the mind of the Legislature in former times, and which they had endeavoured to meet. Whether they had effectually done so or not seems to me to be perfectly immaterial to inquire. That is what they intended to do, looking at the statutes themselves; and when I look with that view at the Act of 1891, it seems to me that sect. 5 is as perfectly independent as anything can be. All the restrictions which were applied to deeds by the Act of 1888, and which assumed, for the purpose of that statute, that the land was to continue inalienable, are inapplicable to the policy of the law as exhibited by the Act of 1891; because land devised to a charity is no longer to be inalienable. On the contrary, it is one of the conditions of the validity of the disposition that the land shall be turned into personalty within a year, subject to the power to apply to have the sale put off if the facts should render it desirable. Then, when I look at the section, I find that land may be assured by will to or for the purpose of any charitable use, but subject to the provision that I have referred to, that such land shall, notwithstanding anything contained in the will to the contrary, be sold within one year from the testator's death. The moment that law is enacted it seems to me that all the argument directed against holding land in mortmain is gone. If that provision is properly administered, there is no holding of the land in a dead hand at all. The whole scheme has been altered, and, therefore, it is unnecessary, if that is the true view of the meaning of the 5th section, to go through the different requirements of the Act of 1888 to shew that they are inapplicable. I think, myself, they are absolutely inapplicable. The whole tenor of the legislation is different, and when I add to that that there is nothing in the Act of 1891 which in the smallest degree suggests the reading of the two Acts together, as making one enactment, or making the disposition of the will subject to the restrictions of the Act of 1888, it is very difficult indeed to suggest that by any process this Court or the other Court should fasten on sect. 5

the restrictions of the Act of 1888, which, as I say, are dealing with different subject-matters, and are pointed to a different state of the law altogether. I am therefore of opinion that with the substance of Mr. Justice *Stirling's* judgment I should concur.

There is only one point on which I venture to differ from him, and that is in which he appears to suggest in giving judgment that those restrictions are repealed so far as they are applicable to deeds. I do not think that that is accurate. It seems to me that the legislation as to deeds is exactly where it was. I do not think there has been any repeal of those restrictions at all; and I think that, if you were dealing with a deed now, you would be bound by them just as much as you would before 1891. For the same reasons that I confirm the judgment in other respects, I differ from Mr. Justice *Stirling* in that observation, which he does not indeed make directly, but which is implied in his reasoning, that sect. 4 is repealed. I think that is erroneous. Subject to that observation, I think the judgment is right, and that this appeal should be dismissed.

LINDLEY L.J.:—

I am entirely of the same opinion, and I do not think, when the Acts are carefully looked at, that there is much room for doubt. There is no doubt that up to 1891 land could not be left by will to charitable purposes except in certain specified cases. There were many exceptions introduced by statute at various times; but leaving those out, and speaking generally as to the tenor of the law, you could not devise land to any charitable purpose, or for the benefit of any charity. It was absolutely void under the Act of *George* II. That was so in 1888; and although the definition clause in sect. 10 of the Act of 1888 says that assurances include a will, yet when you come to read sect. 4, which relates to the conditions under which assurances may be made to charitable uses, you will find that wills are expressly excluded by the language of the clause. In other words, in 1888 Parliament had not made up its mind to authorize devises of land for charitable purposes, and the whole of sect. 4 of the Act of 1888 is worded so as to be intelligible as applied to deeds, and to be inaccurate as applied to wills. I agree that

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there are a few words in sub-sect. 3 which might be applied to wills. I do not think the whole of the sub-section is applicable, but there are a few words which might possibly apply. But, then, when you come to apply sect. 4 to a will, it is embarrassing at every turn. You cannot do it without straining the language of sub-sect 2 by reading "the making thereof" as if it were "coming into operation," and so on. That was the state of things up to 1891. In 1891 Parliament took a totally different view of what was expedient, and it authorized persons in express terms to devise lands to charitable purposes by will. This was a total revolution of the law, and a total departure from anterior legislation from the time of the *Mortmain Acts*, including the Act of *George* II., and down to 1888. It was a totally new line of thought, and what the Legislature did was this. They say in sect. 5 of the Act of 1891 that "land may be assured by will to or for the benefit of any charitable use, but, except as hereinafter provided"—that refers to sect. 8, which refers to land which charities are allowed to keep for their own occupation—"such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any Judge thereof sitting at Chambers, or by the Charity Commissioners." That provision, that land which is given by will for charitable purposes must be sold, affords all the protection necessary against the acquisition of land by charities. Charities cannot get the land, and you do not want all those provisions that are contained in sect. 4 of the Act of 1888, where the charities are to take the land. What is the difficulty about carrying out the section? The land has to be sold. There "land," I suppose, means the soil or the house, or whatever it is. But when you talk about selling land, what are you going to sell? Are you going to sell the fee simple, or are you going to sell some less interest? Sect. 5 leaves that all open, and you must apply your common sense to what is to be sold. Sect. 5 does not say that you are to sell the land for all the interest the testator had in it. Sect. 5, when you come to understand the context and the meaning of the Legislature, is this—you are to sell the land and all the interests which are

given to charities. There is not the slightest violence done to the language of sect. 5. When you say that the land is to be sold, you ask yourselves the question, What are you going to put up for sale? Are you going to sell the reversion or the estate for life, or what? You are to sell what the charity is not to have. That seems to me to be perfectly plain; and, as regards the repeal of the definition clause as to land, that is obvious enough. The money arising out of the sale of land is an interest in land, and it was intended that such interest in land might be disposed of. Therefore, sect. 3 of the Act of 1891 says so; and the definition of "land" contained in the *Mortmain and Charitable Uses Act*, 1888, is repealed. That was partly necessary, because of the word "interest." There would have been more or less a conflict between the two sections if one section had said that land includes an estate and interest, and then the other section had said certain estates and interests shall not be included. I do not say that it could not have been drafted otherwise; but to my mind the whole object of this recasting of the definition was to prevent its being within the *Mortmain Act*. I do not doubt for a moment that Mr. Justice *Stirling's* decision is perfectly right. I think he went a little too far in saying that sect. 4 is repealed, if he really meant to say so. A gift to charity need not be by deed now. It may be by will; but if it is by deed, then sect. 4 stands. The appeal must be dismissed.

A. L. SMITH L.J.:—

I think that Mr. Justice *Stirling's* judgment is correct. It seems to me that the point Mr. *Hastings* and Mr. *Young* raised as to the repeal of the definition clause in the Act of 1888 by sect. 3 of the Act of 1891 has been answered. As I take it, the meaning of the Legislature is this. By the Act of 1888, sect. 4, and the group of sub-sections therein, alienation of land by deed for charitable purposes is dealt with; and in the view I take of the Acts of 1888 and 1891, sect. 4 of the Act of 1888 and all the other sub-sections with regard to the alienation of land by deed stand at the present time exactly as therein enacted, and if land is to be alienated by deed for charitable purposes, and is not to be necessarily sold, the provisions of sect. 4

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must be resorted to, and the deed must be executed and inrolled, and must be drawn in accordance with that section, just as it was passed in the year 1888.

Before the Act of 1891, except in the excepted cases with which we need not deal, there could not be an assurance of land by will for charitable uses. In 1891 this Act of Parliament was passed to enable that to be done. It stands by itself. It incorporates no part of the Act of 1888, but it does repeal the definition clause in the Act of 1888, and this was the peg on which Mr. *Graham Hastings*' argument really hangs. He contended that "land" in the definition clause in the Act of 1888 is defined as including tenements and hereditaments corporeal and incorporeal of whatsoever tenure, "and any estate or interest in land"; and he said that is repealed, and because that is repealed and a new definition clause substituted in the Act of 1891, therefore "land" in sect. 5, which is the one we have to construe in this case, does not mean an estate in land, because they have taken the pains to strike out "an estate in land" by repealing the section in the Act of 1888 and not inserting the words again in the Act of 1891. At first sight that seems a difficulty, but Mr. *Buckley* has satisfied me why it was necessary to repeal the section in the Act of 1888, when they incorporated in the definition clause of the Act of 1891 the words, "but not money secured on land or other personal estate arising from or connected with land." Unless something had been done, at any rate, with the definition clause of the Act of 1888, there would have been a difficulty in construction, and the Legislature therefore thought well to repeal the whole of the definition clause of the Act of 1888. Certainly it was necessary to repeal the words "and interest in land," and as Mr. *Buckley* has pointed out—and I think he is well founded in the observation—it was thought not necessary to leave in the word "estate," for how can a man convey land unless he can convey an estate which he has in it to the grantee? I read sect. 5 as including any estate which a grantor has to convey in land, whether in fee simple in remainder, or in reversion. I think it means, "an estate in land may be assured by will to or for the benefit of any charitable use, but except as hereinafter provided, such estate in land shall, notwithstanding

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anything contained in the will to the contrary, be sold within one year." I read this as a matter entirely independent of sect. 4 of the Act of 1888. Now, an estate in land may be assured by will; but if it is assured by will, within one year from the death of the testator, which is the time from which the will would operate, that land is to be sold. As has been pointed out, these sub-sections of sect. 4 were undoubtedly drafted with a view that the assurance was to be by deed. When it is attempted to apply them, as it was by Mr. *Graham Hastings* and Mr. *Young*, to an assurance by will, one and all in substance fail. They will not work when the assurance is by will. I am of opinion that the Act of 1891 must be read by itself, and that Mr. Justice *Stirling's* judgment is correct, except that if he meant to hold that sect. 5 repealed the sub-sections of the Act of 1888, I do not agree with that opinion. I do not, however, think the true meaning of his judgment, which I have carefully read, was that it did repeal them.

Solicitors: *Last & Sons; S. M. & J. B. Benson; West, King Adams & Co.; Patey & Warren.*

M. W.

In re H. W. STRACHAN (AN ALLEGED LUNATIC).

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Jan. 21;
Feb. 4.

Lunacy—Practice — Deceased alleged Lunatic — Inspection of Documents — Privilege.

No one is allowed to inspect documents in the custody of the Court in Lunacy without an order of one of the Masters or of a Judge in Lunacy.

Inspection of the reports made to the Court by its own medical advisers is never permitted.

But, with this exception, liberty to inspect documents will be given to any person who can satisfy the Master or a Judge that he wants it for a reasonable and proper purpose, provided that the lunatic, if living, is not injured thereby.

After the death of the lunatic, the general rule is to allow inspection to any person claiming an interest in his property who can satisfy the Court as above mentioned.

As a matter of law, privilege is no bar to inspection in Lunacy.

Inspection will not be permitted to a litigating party who applies for

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it, before the trial of the litigation, in order to find out his adversary's case.

The doctrine of privilege, and the principles applicable to inspection, discussed and explained.

An order for an inquiry as to the sanity of an alleged lunatic was made upon the petition of *A.* While the inquiry was pending the alleged lunatic died, having made a will in favour of *B.* *A.* then brought an action in the Probate Division against *B.*, alleging that the will had been made under undue influence while the testator was insane, and was invalid. *B.* counter-claimed, asking for probate, and applied in the lunacy for liberty to inspect the petition and the affidavits in support thereof, which were in the custody of the Court, in order that she might ascertain what allegations of mental incapacity were intended to be made at the trial of the action, and that she might have an opportunity of rebutting them:—

Held, that an order for inspection ought not to be made in such a case.

IN the month of April, 1894, a petition for an inquiry as to the sanity of *Horace Ward Strachan*, an alleged lunatic, was presented by his brother *James Arthur Strachan.*

Affidavits were filed in support of the petition, and an order for an inquiry was made; but on the 13th of June, 1894, before the inquisition was concluded, the alleged lunatic died, and thereupon the proceedings in Lunacy came to an end.

In February and March, 1894, the alleged lunatic had made two wills in favour of Mrs. *Elizabeth Sanford,* neither of which contained any appointment of executors.

After his death, the validity of these wills was disputed by his brother *J. A. Strachan* on the ground of insanity, undue influence, and defective execution; and, in July, 1894, *J. A. Strachan* brought an action in the Probate Division for the administration of his deceased brother's estate, upon the footing that he had died intestate. In this action, to which Mrs. *Sanford* was made Defendant, he sought to have it declared that these two wills had been made by his brother when insane, and were induced by her undue influence acting upon his brother in his then condition.

Mrs. *Sanford* counter-claimed to have it declared that the two wills were valid, and that probate thereof might be granted. Notice of trial was given on the 27th of October, and on the 17th of November the Plaintiff (*J. A. Strachan*) made an affidavit of documents, in which he claimed privilege for certain

documents in his possession, including drafts or copies of his petition in Lunacy, and of the affidavits filed by him in the lunacy in support of the petition. An application by Mrs. *Sanford* in the Probate action for the production of these documents by the Plaintiff was refused by Sir *Francis Jeune* on the 19th of November, 1894. That order was not appealed against; but in December, 1894, Mrs. *Sanford* made application by petition to a Master in Lunacy for liberty to inspect the petition, affidavits, and all other documents and proceedings in the lunacy, which were on the file in the custody of the Master, and to take copies thereof. The petition was intituled in the Probate action, as well as in Lunacy, and was served upon the Plaintiff *J. A. Strachan.*

The 4th paragraph of the petition was as follows: "Your petitioner is desirous of inspecting and taking copies of and extracts from the petition affidavits and other proceedings in the matter of the supposed lunatic in order that she may ascertain what allegations of mental incapacity are intended to be made at the trial of the said Probate action, and that she may have an opportunity of rebutting them."

The application was opposed by the Plaintiff *J. A. Strachan*; but the Master made an order giving Mrs. *Sanford* liberty to inspect the petition in Lunacy and the affidavits in support of it, and this order was affirmed by Lord Justice *Rigby*, on the ground, as it was stated, that it was made in the interests of truth.

The Plaintiff, *J. A. Strachan*, now appealed.

Oswald, Q.C., and *R. H. Pritchard*, for the Appellant:—

These documents came into existence for the purpose of proceedings in Lunacy which are at an end and cannot be revived. They are now documents of a private and confidential nature belonging to the Plaintiff, and they contain the evidence on which the Plaintiff intends to rely in the Probate action. To see them is in reality to see the briefs of his counsel on the hearing; and they are privileged from discovery, as the President of the Probate Division has already held: *Pearce* v. *Foster* (1); *Nordon* v. *Defries* (2); *Bullock* v. *Corry* (3).

(1) 15 Q. B. D. 114. (2) 8 Q. B. D. 508. (3) 3 Q. B. D. 356.

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According to the practice in Lunacy, Mrs. *Sanford* is not entitled to inspect the proceedings without an order of the Master or a Judge, the making of which is discretionary. The discretion will not be exercised unless the Applicant makes out a proper case for the purpose: *In re Wood* (1); *In re Smyth* (2); and liberty to inspect has been given only in cases where the applicant was able to shew either *primâ facie* evidence of an interest in the documents, or that they contain something which will support his own case. Here, the Applicant shews nothing of the sort; in fact, she puts herself out of Court, for the statement in the 4th paragraph of her petition of the purpose for which she requires inspection shews that this is a fishing application, made to enable her to bolster up her own case at the trial of the Probate action. The order appealed from ought, accordingly, to be discharged.

Bucknill, Q.C., and *English Harrison*, for Mrs. *Sanford*:—

There is no analogy between proceedings in Lunacy and at law. Proceedings in Lunacy are not in the nature of common law actions, but are inquiries in which the fullest information is always open to both sides. It was formerly the practice that any stranger might inspect the documents in a lunacy. But subsequently to 1825 a distinction was drawn between parties to the proceedings and those "claiming under them" on the one hand, and mere strangers on the other hand; and the former were held entitled as of right to inspection, whilst the latter had to make out a case for it to the satisfaction of the Court: *In re Wood* (3). Treating Mrs. *Sanford* as not entitled as of right to an inspection, all that she has to do is to give the Court "*primâ facie* evidence of an interest in the documents": *In re Smyth*. Not a possessory interest, because documents on the file are the property of the Court; but, in the words of Lord Justice *Cotton* in that case (4), "Any *primâ facie* case which makes it reasonably probable that the documents may contain something to support the applicant's case is enough"; and we submit that there is such a *primâ facie* case here. But the Applicant in this case is

(1) 4 D. J. & S. 134.
(2) 15 Ch. D. 286; 16 Ch. D. 673.
(3) 4 D. J. & S. 136.
(4) 16 Ch. D. 674.

not a stranger. She is a person "claiming under" the alleged lunatic. In *In re Smyth* (1) the applicant produced *primâ facie* evidence of being the heir-at-law of the deceased lunatic; here the Applicant is the universal legatee, and she is entitled to see the case that may be made against her, so that she may be able to support her own; which may be supported otherwise than by direct evidence. The documents have been used for the purpose for which they were obtained; the alleged lunatic, if alive, would be entitled to inspection; and though the 4th paragraph of the Applicant's petition may not be happily worded, that should not affect her rights as a person claiming under the deceased. [They also referred to *Re Silcock's Lunacy* (2); *In re Campbell* (3); *Vivian* v. *Little* (4); *Carrow* v. *Ferrior* (5).]

Oswald, in reply, referred to *Lord Salisbury* v. *Nugent* (6) and *In re Scarlett* (7), and contended that the Applicant did not in any sense represent the deceased alleged lunatic.

Cur. adv. vult.

1895. Feb. 4. Lindley L.J. stated the facts of the case, and then continued:—

Before I deal with the objections raised to the inspection of the documents in question by Mrs. *Sanford*, who desires to see them, I will consider the right of any one to inspect documents under the control of Judges in Lunacy.

It is not the practice in Lunacy to produce documents in the office to any one who wants to see them. No one is allowed to see them without an order of one of the Masters or of a Judge in Lunacy: see *Re Silcock's Lunacy* and *In re Wood* (8). A person who has no interest except curiosity to see such documents is not allowed to see them. On the other hand, any one who can satisfy the Master or Judge that he desires to see such documents for any reasonable and proper purpose, is allowed to see them, provided always, if the lunatic is living, that he is not prejudiced thereby.

(1) 15 Ch. D. 286; 16 Ch. D. 673.
(2) 1 N. R. 4.
(3) 13 Ch. D. 323.
(4) 11 Q. B. D. 370.
(5) Law Rep. 3 Ch. 719.
(6) 9 P. D. 23.
(7) Law Rep. 8 Ch. 739.
(8) 4 D. J. & S. 134.

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If the lunatic is dead, the cases of *In re Wood* (1), *In re Ferrior* (2), and *In re Smyth* (3) shew that, if the Applicant wants to see documents in the custody of the Court, in order to make good a claim to the lunatic's property, such a purpose is *primâ facie* sufficient to induce the Court to allow inspection, even although the request is opposed by a rival litigant. Nor have I found any case in which an application by such a person, for such a purpose, has been made and refused. But it is obvious that there are some exceptions to this general rule. The Court would not, under any circumstances, make an order for the inspection of the reports which are confidentially made to the Court by its own medical advisers. But, with this exception, and possibly some others, which do not occur to me at the moment, the general rule is to allow inspection by any person claiming an interest in the property of a deceased lunatic, or alleged lunatic, who can satisfy the Court that he wants inspection for some reasonable and proper purpose.

The fact that the documents are of such a kind that a litigant who had them could not be compelled to produce them does not, as a matter of law, disentitle his opponents from seeing them. As a matter of law, as distinguished from a matter which the Court ought to consider in the exercise of its discretion, privilege is no bar to inspection in such a case as I am now considering.

The privilege which exists in the case of confidential communications rests on the grounds explained in *Greenough* v. *Gaskell* (4), *Reid* v. *Langlois* (5), and *Anderson* v. *Bank of British Columbia* (6).

In order to insure freedom of consultation a party to a litigation is not bound to disclose what passes verbally or in writing between himself and his solicitor. The privilege extends to documents and information obtained by the party or his solicitor or persons employed by them to get up the party's case in a litigation which is pending or with a view to litigation. But before trial the privilege simply entitles the litigant, upon

(1) 4 D. J. & S. 134.
(2) Law Rep. 3 Ch. 175, 182.
(3) 15 Ch. D. 286; 16 Ch. D. 673.
(4) 1 My. & K. 98.
(5) 1 Mac. & G. 627.
(6) 2 Ch. D. 644, 649.

making a proper affidavit, to withhold production of documents in his possession. That is all.

When documents are not in the possession or power of a litigant, no question of discovery by him before trial, or of privilege from such discovery, can arise. Documents in the custody of the Masters in Lunacy are not in the possession or power of a litigant (*Vivian* v. *Little* (1)); he has not to produce them or to make any affidavit about them; and if a Judge in Lunacy is applied to for inspection, privilege from discovery is an irrelevant topic for discussion, except so far as it may bear upon the exercise by the Court of the discretion which it has in the matter. The duty of the Court is to act with perfect impartiality between the parties before it: not assisting either against the other, or more than the other, where neither can establish any right to such assistance against the other. Now, in the present case, if inspection is allowed, Mrs. *Sanford* will see her adversary's hand, which she cannot do without the assistance of the Court; whilst, if inspection is refused, the Court will not confer on her opponent any advantage which he has not already got. Mrs. *Sanford* has no right to this advantage, and I see no reason why she should have it. Her own petition shews that she does not want to see the documents in order to support her own case. She wants to see how her opponent hopes to prove his case, and what she wants to see is the evidence he has procured to prove the insanity which he alleges and she disputes.

In *England* it is considered contrary to the interests of justice to compel a litigant to disclose to his opponent before trial the evidence to be adduced against him (see *Benbow* v. *Low* (2)). It is considered that so to do would give undue advantages for cross-examination and lead to endless side issues; and would enable witnesses to be tampered with, and give unfair advantage to the unscrupulous.

It is very true that an honest and fair-dealing litigant, on seeing how strong a case his opponent had, might at once withdraw from further litigation. But our rules of evidence and of discovery are not based upon the theory that it is advantageous to let each side know what the other can prove, but rather the

(1) 11 Q. B. D. 370. (2) 16 Ch. D. 93.

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reverse. Moreover, Courts act upon this view when asked to allow inspection of documents under their control. In *North Australian Territory Company* v. *Goldsborough Mort & Co.* (1) inspection of an examination under the *Companies Act* was refused on this very ground.

Such being the view of what justice requires, I feel constrained to say that, notwithstanding the general rule laid down in *In re Wood* (2), and followed in *In re Smyth* (3), this case is one in which the order for inspection ought not to have been made. It is true that the documents have been used for the purpose for which they were obtained, and that the deceased could at any time have seen them. It is also true that Mrs. *Sanford* claims under him. But she has not seen them, and the considerations to which I have alluded are not deprived of their force by the fact that the documents have been used already in the lunacy proceedings.

The order, therefore, must be discharged with costs, but without prejudice to any fresh application which Mrs. *Sanford* may make after the trial of the pending Probate action.

A. L. Smith L.J.:—

In the month of April last application was made to me, sitting in Lunacy, by *James Arthur Strahan*, brother of *Horace Ward Strahan*, an alleged lunatic, for an order that an inquiry should be held as to his brother's sanity and capacity to manage himself and his affairs.

Affidavits of medical men and others were produced as to the condition of mind and the conduct of the alleged lunatic which led me to the conclusion that a *primâ facie* case for an inquiry had been established, and I made an order accordingly. These affidavits were filed in due course, and remain so filed at the present time. [His Lordship here stated the facts of the case, and then continued:—]

It cannot be disputed that, although these affidavits are filed in a public office, the Defendant, Mrs. *Sanford*, is not entitled to obtain inspection of them without an order of a Master in Lunacy,

(1) [1893] 2 Ch. 381. (2) 4 D. J. & S. 134.
(3) 15 Ch. D. 286; 16 Ch. D. 673.

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subject to an appeal to a Lord Justice sitting in Lunacy, which of itself shews that she has no right to inspection unless she makes out a proper case in that behalf, for it is obvious that the Master and Judge are brought in for the purpose of seeing that a proper case is made out before an inspection is ordered.

I do not doubt that, if Mrs. *Sanford* could shew that these affidavits were documents which might support her case in the Probate action, she would have made out a proper case for inspection; and the cases of *In re Wood* (1), *In re Smyth* (2), and other cases cited shew this to be so.

But, in my judgment, Mrs. *Sanford* shews nothing of the kind, and can shew nothing of the kind. She does not want, nor does she suggest in her petition that she wants, to inspect and take copies of these affidavits in order to use them as evidence in support of her own case.

Indeed, it is obvious that if she has the affidavits she cannot put them in as documents in support of her case: they are not documents of title, or documents which can be put in evidence by her in affirmance of her case.

What she really wants inspection of the affidavits for is to be able, or rather that her advisers may be able, to see what the Plaintiff's witnesses are about to say in the witness-box upon the issue, now pending between her and the Plaintiff in the Probate action, as to the sanity or insanity of the testator, and thus to be able to prepare herself to knock down if possible by cross-examination the parol evidence of the Plaintiff's witnesses, and to prepare herself also, if she can, with a case in answer thereto.

In fact, a Judge is asked to order that the parol evidence of one side in a hostile litigation about to be tried before a jury shall be shewn to the other side—who his witnesses are, and where they reside. I cannot think that such an order should be made, and in my opinion it would be unfair to do so.

We were told that Lord Justice *Rigby* held that the Defendant ought to see these affidavits, so that the real truth might be arrived at upon the trial, and I agree that this is the paramount object to be arrived at in every trial; but, with all submission, to allow one side to see the parol evidence about to be given by

(1) 4 D. J. & S. 134. (2) 16 Ch. D. 673.

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the other, and who his witnesses are and where they reside, is not, in my opinion, the means by which the real truth will ordinarily be arrived at at *nisi prius*, or in any other hostile litigation.

To give one side the opportunity of knowing what the other side's witnesses are about to say, and who they are, will give an advantage to that side which, from experience, I say would be most unjust to the other side.

If each side, before trial, were to see the evidence of his opponent, and each side were to be told who the witnesses on the other side were to be, and where they resided, well and good, for, in such a case, each side would at any rate be upon an equality of advantage; but that is not our practice, and I need not discuss its advisability; but for a Judge to place one side at an undoubted advantage, and the other side consequently at an undoubted disadvantage, is not, in my opinion, the province or duty of a Judge when called upon to order inspection.

Mr. *Bucknill* roundly asserted that orders for inspection of affidavits made in lunacy proceedings were of daily occurrence, and that he had never heard of any objection thereto. That may be; but he could not shew a case where affidavits were wanted for purposes like the present where an order for inspection had been made, nor do I believe such a case can be found, unless it be an order which has passed *per incuriam*. That affidavits used in lunacy matters may be inspected by parties interested for proper purposes I do not doubt; but I have a clear opinion, considering the purposes for which the affidavits in this case are desired, that this is not a case in which an order for inspection should be made, and I think that this appeal should be allowed, and the petition be disallowed with costs here and below.

Solicitors: *J. B. Churchill; Edmonds & Jubb.*

W. W. K.

MORLEY *v.* RENNOLDSON.

C. A.
1894
KEKEWICH J.
Aug. 7.
C. A.
1895
Jan. 25; *Feb.* 6.

Will—Construction—Condition in General Restraint of Marriage.

A testator by his will bequeathed his residuary personal estate to trustees, on trust for his daughter for her separate use for her life, and after her death in trust for her children, with a gift over, in default of children, to other persons. By a codicil the testator stated that, in consequence of the nervous debility of his daughter, his will was that she should not marry; and, in case of her marriage or death, he directed that his trustees should hold his residuary estate in trust for the persons mentioned in the gift over in the will.

After the death of the testator the daughter married, and in a suit to administer his estate *Wigram* V.C. decided in 1843 that the limitation over contained in the codicil, being in general restraint of marriage, was void as regarded the daughter's life interest, and that she was entitled to the income during her life. She died in 1894, leaving children:—

Held, that the will and codicil must be construed together; that the true construction was that the property was to go over upon the marriage or the death of the daughter, whichever should first happen; and that, as it could not, as had been already decided, go over upon her marriage, the daughter's children were entitled to the fund.

WILLIAM RENNOLDSON, who died in 1837, by his will dated in 1834, bequeathed his residuary personal estate to trustees, whom he also named as his executors, in trust for his daughter, *Margaret Rennoldson*, on her attaining twenty-one or marrying, for her separate use for life; and, after her death, in trust for all her children, who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry, in equal shares, with a gift over to certain persons in default of such children.

In a codicil, dated in 1836, the testator stated that, in consequence of the continued nervous debility of his said daughter *Margaret*, he deemed it advisable to direct that his trustees and executors should apply all moneys bequeathed to her, for her use and benefit as they should think fit; and that his will was that, for the reason aforesaid, she should not marry; and "in case of marriage or death of my said daughter *Margaret*, then I direct that my trustees and executors for the time being shall stand

C. A. 1895 MORLEY v. RENNOLDSON.

possessed of" his residuary estate in trust for the persons mentioned in the gift over in his will, in certain shares.

Margaret Rennoldson survived the testator, and in 1842 she married *Robert Linkson*. Shortly afterwards a suit was instituted for the administration of the testator's estate, and to have the rights of parties ascertained; and at the hearing, in 1843, by Vice-Chancellor *Wigram*—the report of which (1) sets out the will and codicil at length—it was decided that the limitation over in the codicil, being in general restraint of marriage, was void as to *Margaret Linkson's* life interest; and accordingly, by the decree, a declaration was made that such interest as she took under the will did not determine by force of her marriage, and it was ordered that the income of the testator's residuary estate should be paid over to her, for her separate use, until further order, the question as to whether the interest in remainder given to her children by the will was revoked by the codicil being expressly left open by the Vice-Chancellor in his judgment (2).

Margaret Linkson died on the 10th of June, 1894, having had by her marriage ten children, of whom four died under twenty-one and unmarried, and the remaining six were still living and had attained twenty-one or had married.

The testator's residuary estate was now represented by a sum of £4561 4*s.* 6*d.* New Consols in Court to the credit of the action, the dividends on which had been paid to *Margaret Linkson* during her life, pursuant to the decree.

In consequence of *Margaret Linkson's* death, the question left open by the judgment of Vice-Chancellor *Wigram* now came on for decision, upon a petition by the persons entitled under the gift over in the codicil for payment out to them of the fund in Court.

The petition was heard before Mr. Justice *Kekewich* on the 7th of August, 1894.

Haldane, Q.C., and *Hadley*, for the Petitioners:—

Two questions arise here: first, whether the clause in the codicil, which has been held to be void as against the testator's daughter, as being in restraint of marriage, is equally void as

(1) 2 Hare, 570. (2) 2 Hare, 584.

against the children; and secondly, whether the codicil is to be construed as a revocation of the gift in the will to the children, and as creating a substituted gift in favour of other persons.

Upon the first point, there is no objection at all to a gift to *B.* on condition that *A.* does not marry. Here, as regards the gift to the children, there is a condition precedent, which must not be rejected: *Scott* v. *Tyler* (1); *Re Bellamy* (2); *Bellairs* v. *Bellairs* (3).

Secondly, the effect of the codicil is to revoke the gift in the will to the children.

Renshaw, Q.C., and *Barnard Lailey*, for the surviving children of *Margaret Linkson*:—

A condition in restraint of marriage is altogether void for every purpose, and must be treated as a mere nullity: *Keily* v. *Monck* (4); *Story* on Equity Jurisprudence (5). The gift by the will to the children is clear, and cannot be revoked by the codicil except by words equally clear: *Kellett* v. *Kellett* (6).

Haldane, in reply, referred to *Swinburne* on Wills (7).

KEKEWICH J.:—

There is no reason for me to expound the law as to restraint of marriage, or as to conditions precedent or subsequent: all that can be found in the judgment of Vice-Chancellor *Wigram* in this case. The first question I have to consider is one of construction. That seems to have been already decided, for I read the Vice-Chancellor's judgment as including the question of construction of the codicil, since he said that the conclusion he had arrived at was that the codicil "did, in point of fact, recognise and confirm the prior bequests by the will." Mr. *Haldane* says that the Vice-Chancellor was only regarding the gift for life; but I do not so read the judgment. There is no reservation there as to the construction, though, in a subsequent

(1) 2 Wh. & T. L. C. 6th Ed. p. 120; 2 Bro. C. C. 431; 2 Dick. 712.
(2) 48 L. T. (N.S.) 212.
(3) Law Rep. 18 Eq. 510.
(4) 3 Ridgeway's P. C. 205, 261.
(5) 13th Ed. Vol. i. Ch. vii., § 289, p. 290.
(6) Law Rep. 3 H. L. 160, 167.
(7) Ed. of 1611, p. 168; 7th Ed. Vol. ii. Part iv., § 12, p. 491.

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part of the judgment, he leaves open the question of the children's right to take.

Therefore, upon the question of construction, the Vice-Chancellor's judgment—which was a considered judgment—is clear. It would be inconvenient for me to take any other view as to the construction, even if I saw any reason to do so.

Then, the gifts by the will being confirmed by the codicil, the testator seeks to avoid them by imposing a condition in restraint of marriage. The Vice-Chancellor held that, as to the life interest, the testator could not do that. A gift to a stranger may be defeated in that way: but are children in the same position as third persons? Can a man say, "I give property to my daughter for her life, and then to her children"—whom she could only have by marriage—"I know I cannot defeat my daughter's interest; but if she marries and has children, then I will defeat their interest"? I think not, for the children claim only through their mother. They are entitled to the fund.

G. I. F. C.

C. A.

Against this decision the Petitioners appealed. The appeal came on for hearing on the 25th of January, 1895.

Haldane, Q.C., and *Hadley*, for the Appellants:—

By the codicil there is a clear revocation of the original gift in the will, and a new gift is made—namely, a gift over to the Appellants on the marriage or death of *Margaret*. This is a perfectly legal gift, and the testator's motive in making it is immaterial: *Occleston* v. *Fullalove* (1); *Ayerst* v. *Jenkins* (2). "If a man make a feoffment upon condition that the feoffee shall kill *I. S.*, the estate is absolute, and the condition voyd": *Coke* upon *Littleton* (3). If the recital of the testator's wish about his daughter *Margaret* had been omitted from the codicil, the gift would have been clearly good, and the insertion of the recital can make no difference. The gift to the Appellants vested upon the death of the testator, but to take effect upon the marriage or death of *Margaret*, which should first happen. There is no rule

(1) Law Rep. 9 Ch. 147, 161. (2) Law Rep. 16 Eq. 275.
(3) 206 b.

of law or of public policy which renders the codicil void *in toto*. The rule that a condition subsequent in general restraint of marriage is void has never yet been applied except to prevent the taking property away from the person who is forbidden to marry. The rule will not be extended for the benefit of third persons, such as the children of the person who is not to marry: *Bellairs* v. *Bellairs* (1); *Scott* v. *Tyler* (2).

Renshaw, Q.C., and *Barnard Lailey*, for the surviving children of *Margaret*:—

[LORD HALSBURY:—We wish to hear you only upon the construction of the codicil.]

The codicil cannot be construed apart from the will. The word "death" must mean death before marriage. There is no gift over in the event of *Margaret's* death after marriage, for the testator declared that he wished her not to marry. Clearly he did not contemplate her death after marriage. Another view of the construction is, that "marriage or death" means "which of the two shall first happen." The testator did not contemplate that the Court would hold the gift over on marriage to be void.

In neither view of the construction has the event happened upon which the gift over was to take effect.

[They were stopped by the Court.]

Haldane, in reply:—

Upon the true construction of the codicil it is not a gift upon condition. The interest in remainder vested in the Appellants upon the death of the testator; the possession was suspended during the life of *Margaret*, and it was to be accelerated upon her marriage. In effect, her children never took any interest. There is no question of defeating a gift to the children, but the testator has only stated his motive for making a new gift which supersedes the original gift to the children. There is not a substituted gift, but an original new gift in place of the gift made by the will. The intention was that in no event should *Margaret's* children take.

(1) Law Rep. 18 Eq. 510. (2) 2 Dick. 712.

C. A. 1895 MORLEY v. RENNOLDSON.

LORD HALSBURY:—

In my opinion this appeal must be dismissed. The question turns upon a very narrow point of construction. If we were to read the codicil as an original and independent gift, I should probably agree with Mr. *Haldane's* argument. But we must read the will and the codicil together, and then we see that the testator begins by making a gift to his daughter *Margaret* and her children, and afterwards he changes his mind and says that she is not fit to marry, and that his will is that she shall not marry, and that in case of her marriage or death the property is to be held on trust for the Appellants. It is not an original and independent gift. In my opinion, the true construction is that upon the marriage or death of *Margaret*, whichever shall first happen, the property is to go over, or that it is to go over upon her death without issue. It has already been decided that the property could not go over upon her marriage, and neither of the other events contemplated by the testator has happened. When we look at the whole instrument—that is, the will and the codicil taken together—it is plain that the testator intended that his daughter *Margaret* should not marry, and he did all that he could do to give effect to that intention, but the law does not permit his intention to be carried out.

LINDLEY L.J.:—

I am of the same opinion. I was much struck with the ingenuity of Mr. *Haldane's* reply, and, no doubt, if we were to throw the will into the fire, and read the codicil as an entirely new testamentary disposition, his argument would be correct. But we have no right to do that, and the two instruments must be read together. We cannot treat the will as revoked any further than is necessary in order to give effect to the codicil. The obvious meaning of the codicil is that, in the event of the marriage or death of *Margaret*, whichever shall first happen, the property is to go over to the Appellants. It could not go over upon the marriage; that has been already decided by Vice-Chancellor *Wigram*. The property cannot therefore go over as the testator intended; how, then, is it to go over at all? The true result is, that the will was not revoked by the codicil. I

think this follows logically from the decision of Vice-Chancellor *Wigram*, though the point was not exactly covered by his decision. I cannot find that the testator had any intention that in the events which have happened the Appellants should take the property.

A. L. SMITH L.J.:—

Notwithstanding the extremely able argument of Mr. *Haldane*, I am of the same opinion. By the codicil the testator confirmed the gift which he had made by the will, but placed a restriction upon his daughter's marrying. So far as he could legally do so, he prevented her from marrying. It was held by Vice-Chancellor *Wigram* that the condition, being in general restraint of marriage, could not be enforced. The result is that the Appellants never took anything at all, and the gift to the children of *Margaret* remains in force. The appeal must be dismissed.

Solicitors: *A. W. Pearce*, agent for *Pearce & Keele, Southampton; Haynes & Claremont.*

W. L. C.

In re ABDY. RABBETH *v.* DONALDSON.

[1893 A. 1787.]

Quasi-separation Deed—Construction—Concubinage—Re-cohabitation.

A *quasi*-separation deed was executed between a man and a woman, who had been living in concubinage, by which they mutually covenanted that they would in future live separately, and he covenanted to pay her an annuity during her life:—

Held, that the obligation to pay the annuity did not cease by implication upon the parties subsequently resuming cohabitation.

THE action was commenced by originating summons to administer the estate of *R. J. Abdy*, deceased, the Plaintiff *Felicia Rabbeth* alleging that she was a creditor and a legatee under his will. The Defendants were: the administrator, with the will annexed, of the testator, and his heir-at-law. An order for administration was made on the 29th of January, 1894. The residuary legatees disputed the validity of the Plaintiff's claim

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to be a creditor, and the Plaintiff took out a summons asking that her claim might be allowed. The summons was referred by the Chief Clerk to the Judge.

Previously to December, 1889, the Plaintiff had lived with the testator as his mistress. Differences then arose between them, and they agreed to live separately, and a deed dated the 20th of December, 1889, was thereupon executed by them.

The deed contained a recital that the testator had for some time past cohabited with the Plaintiff, and that differences had arisen between them, and they had consequently agreed to live separate from each other for the future, and to enter into such arrangement as was thereinafter expressed. And it was witnessed that, "in pursuance of the said agreement and in consideration of the premises and of the covenants hereinafter contained, the said *R. J. Abdy* and the said *F. Rabbeth* do hereby mutually covenant, the one with the other, that they will in future live separate from each other. And, as a separate covenant, the said *R. J. Abdy* doth hereby for himself, &c., covenant with the said *F. Rabbeth* that he will, during the life of the said *F. Rabbeth*, or so long as she shall not in any way molest the said *R. J. Abdy*, and shall duly perform and observe the covenant on her part hereinafter contained, pay to the said *F. Rabbeth* the annual sum of £366, by equal monthly instalments of £30 10*s.*, on the first day in every month in every year, the first payment thereof to be made on the 1st of January, 1890. And the said *F. Rabbeth* doth hereby covenant with the said *R. J. Abdy* that she will not at any time hereafter contract or incur any debts or engagements in the name or on account of the said *R. J. Abdy*, and will at all times hereafter (provided the said annual sum is duly and punctually paid) keep indemnified the said *R. J. Abdy* from and against all debts and liabilities hereafter to be contracted or incurred by the said *F. Rabbeth*, whether for her wearing apparel, maintenance, support, or otherwise, and from and against all claims and demands for or on account of the same."

After the execution of this deed the testator and the Plaintiff lived separately for some time; but in November, 1892, cohabitation was resumed. The testator died on the 3rd of June, 1893. The annuity was paid to the Plaintiff up to the time of his death,

but no payment had been made to her since. It was not alleged that she had committed any breach of her covenant contained in in the deed.

The summons was heard before Mr. Justice *North* on the 21st of December, 1894.

Swinfen Eady, Q.C., and *C. T. Mitchell*, for the claimant.

J. W. Baines, for the administrator, with the will annexed.

S. Hall, Q.C., and *Alexander Young*, for the residuary legatees:—

If the covenant to pay the annuity is not bad, as we submit in the alternative it is, it was intended to operate only so long as the parties should live apart, and, by analogy to the construction put by the Court on similar provisions in separation deeds between husband and wife, the annuity determined on the separation coming to an end: *Nicol* v. *Nicol* (1).

Swinfen Eady, in reply:—

Even in a separation deed between husband and wife, when there is a covenant by the husband to pay an annuity to the wife, it does not follow that the obligation ceases on the parties coming together again: whether the annuity ceases upon cohabitation being resumed is a question of construction. The deed may either expressly, or by implication, provide for the continuance of the obligation, notwithstanding that the separation has come to an end. There is no analogy between a genuine separation deed and a similar deed between persons who have not been married. In the case of the latter kind of deed, it has been decided that an express provision, making an annuity, such as that provided here, cease on the parties coming together again, is void, the stipulation for the payment of an annuity being itself good: *Ex parte Naden* (2).

NORTH J.:—

The case of *Ex parte Naden* gives some confirmation to the view which I was prepared to take independently of authority.

(1) 31 Ch. D. 524. (2) Law Rep. 9 Ch. 670.

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I can see no ground whatever for saying that this deed is to be construed as determining the annuity provided by it at any particular time. The testator's covenant is to pay the annuity to the Plaintiff for her life, and I cannot see any ground for saying that it is determinable if the parties cohabit together again, because, in a totally different case, if a husband and wife had separated and should, as the law approves of their doing, make up their differences and come together again, the provisions of a separation deed might be at an end; the reason for the deed coming to an end in that case does not apply here. There the deed comes to an end because, if it is merely what is called a separation deed, it is as such intended to provide for the wife only during the continuance of the separation. If, on the other hand, even a deed between husband and wife is something more than a separation deed, and provides in terms, that for instance, an annuity shall be paid by the husband to the wife, not only during the separation, but until she dies, whether there has been a re-cohabitation or not, it would be a perfectly good deed, only it would not be a separation deed pure and simple: it would be a separation deed *plus* something else. There seems to me to be no analogy of any kind between an arrangement of that kind between husband and wife, and such an arrangement as this between persons who are recognised as not being husband and wife; and when, so far as can be gathered from the deed itself, the very last thing contemplated was re-cohabitation. There had been cohabitation, and differences had arisen, and this deed provided for a separation. In my opinion, nothing has happened to make the covenant inoperative.

D. P.

C. A.

The residuary legatees appealed. The appeal was heard on the 20th of February, 1895.

S. Hall, Q.C., and *Alexander Young*, for the Appellants:—

In a separation deed between husband and wife there is an implied agreement that, in case the parties shall subsequently resume cohabitation, the deed shall cease to operate. The same principle applies here. The consideration for the testator's

covenant was, that the parties should live separately for the future, and, as that stipulation has not been performed, the proper conclusion is that the covenant is at an end. There was nothing contrary to public policy or morality in the agreement to live separately, but rather the contrary. The consideration for the deed has failed: *Bindley* v. *Mulloney* (1); *Nicol* v. *Nicol* (2). If the covenant did not come to an end on the resumption of cohabitation, a mistress will stand in a better position than a wife.

Swinfen Eady, Q.C., and *C. T. Mitchell*, for the Plaintiff:—

The testator's covenant to pay the annuity is a "separate covenant." It is not suggested that the Plaintiff has committed any breach of her covenant. The Court is asked to read into the deed a proviso making it void in case of re-cohabitation. Such a proviso, if it had been expressly inserted in the deed, would have been void: *Ex parte Naden* (3). The Court will not imply such a proviso. An agreement to make a provision for a woman in consideration of past cohabitation would be perfectly good.

S. Hall, in reply:—

The testator's covenant was "separate" only in this sense, that it was not a "mutual" covenant. The covenants are all connected as part of one scheme.

LORD HALSBURY:—

In my opinion this appeal must be dismissed. The construction of this deed which Mr. *Hall* has suggested cannot, I think, be adopted without doing violence to the ordinary rules of construction.

I have no doubt that the object of the testator was to make a provision for the Plaintiff, with whom he had been living as his wife, at a time when they both intended to separate finally, and this annuity was meant to be a final provision for her. And, looking at the recitals in the deed, I have no doubt that this is

(1) Law Rep. 7 Eq. 343. (2) 31 Ch. D. 524, 529.
(3) Law Rep. 9 Ch. 670.

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what both parties imagined they had done. But we must look at the actual words of the covenant. The covenant is to pay the annuity "during the life" of the Plaintiff. I decline to insert in the deed words which the parties themselves have not put there. There is a separate covenant by the testator to pay the Plaintiff an annuity during her life, and I cannot imply a proviso that the annuity is to cease in the event of the parties cohabiting again—a proviso which, if it were there, would, according to *Ex parte Naden* (1), be void, because it would be *contra bonos mores*. But, apart from any such consideration, and looking only within the four corners of the instrument, I must give the words their ordinary construction according to English grammar, and I can find nothing in the deed (beyond the reasons for entering into the covenant) which defeats or determines the operation of the covenant in the future. I am therefore compelled to construe the deed as the learned Judge has done. The analogy of separation deeds between husband and wife absolutely fails. In that case the very nature of the relation between the parties imports (although this may not be stated in express terms in the deed) that while the husband and wife are living together the wife is entitled to maintenance from the husband, and as that relation is about to terminate, the subsistence of the wife is to be guaranteed by the husband giving her an annuity or other provision. This mere statement shews why it is that, when in such a case the parties come together again, the deed is to be at an end, because what it does is to provide a maintenance for the wife, and therefore, by construction, the Court can insert the words "during the period of separation." No such reasoning applies to the present case, and it is not suggested that any covenant of the Plaintiff has been broken by her.

The result is that the appeal must be dismissed with costs.

LINDLEY L.J.:—

I am of the same opinion. A deed does not in law require any consideration to support it, and therefore the failure of consideration cannot be said to invalidate it. We must follow the language

(1) Law Rep. 9 Ch. 670.

of the deed, and we should be twisting its obvious meaning if we construed it as Mr. *Hall* has asked us to do. The appeal must be dismissed with costs.

A. L. SMITH L.J.:—

The testator and this lady had been living together, not in matrimony, and they determined to separate. Thereupon this deed was executed by them, and by it the testator absolutely covenanted to pay to the lady an annuity of £366 during her life, or so long as she should not molest him, and should perform a covenant on her part contained in the deed. It is now said that, although it is on its face an absolute covenant, it should be read as a covenant lasting only so long as the parties shall live separate and apart. At first I was impressed with that view, by considering what the parties would probably have done if they had thought of the possibility of their coming together again. But it would not be right to import that consideration into the construction of this covenant. It is in terms an absolute covenant, and, in my judgment, it is not made dependent on the parties continuing to live separate and apart *in futuro*. I agree, therefore, in construing the deed as my learned Brothers have done.

Solicitors: *Nokes & Stammers; Black & Moss; J. G. Dalzell.*

W. L. C.

C. A.

1895

STIRLING J.

Jan. 18; *Feb.* 8.

C. A.

Feb. 20.

TREGO *v.* HUNT.

[1894 T. 2405.]

Partners—Partnership Books—Right of Partner to make Copies of Entries—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 24, *sub-s.* 9.

Held (by *Stirling* J. and by the Court of Appeal), that a partner is entitled during the continuance of the partnership to make copies of entries in the partnership books, even with the avowed object of using those entries after the termination of the partnership to assist him to compete in business with his former partners.

THIS was a motion by the Plaintiffs, asking that the Defendant might be restrained from making, or causing to be made, any copy or extract of or from the books of the partnership existing between the Plaintiffs and the Defendant for any purpose other than the purposes of the business of the partnership, and from otherwise committing any breach of the partnership articles.

The Plaintiffs, Mrs. *Anna Trego* and Mr. *W. W. Smith*, were partners with the Defendant under an agreement dated the 13th of February, 1889.

Prior to the year 1888 the Defendant had been in partnership with Mrs. *Trego's* husband under an agreement dated in 1882, by which the partnership term was to expire on the 1st of January, 1890. That agreement contained a provision that the goodwill of the business should be and remain the sole property of Mr. *Trego*, and that, upon his death during the existence of the partnership, he should be at liberty to dispose of his share and interest to such person or persons as he should think proper. Mr. *Trego* died in 1888, having by his will bequeathed his residuary estate, including his interest in the partnership, to Mrs. *Trego*, upon trust for such person or persons as she should appoint. The will contained clauses enabling the business to be carried on, and the testator appointed his wife, Mr. *W. W. Smith*, and the Defendant, his executors.

Mrs. *Trego* afterwards executed a deed by which she appointed the residue of her husband's estate to herself absolutely.

Under these circumstances, a fresh agreement of partnership, dated the 13th of February, 1889, was entered into between the two Plaintiffs and the Defendant. It provided that the partnership formerly subsisting between the parties should be dissolved as from the 31st of December, 1888, and that they should continue to carry on the business in partnership for the term of seven years from the 1st of January, 1889, but nevertheless the goodwill of the business was to be and remain the sole property of Mrs. *Trego*.

Clause 15 of the agreement provided as follows: "All proper books of account shall be kept by the said partners, and proper entries from time to time made therein of all dealings and transactions in anywise relating to the said partnership, and the same shall be kept at the counting-house for the time being of the said partnership, or at the bankers of the said partnership, and each of the said partners shall have full access to such books, writings, and documents, and be at liberty to inspect the same and take copies thereof or extracts therefrom at all reasonable times."

Clause 20 provided that: "Neither of the said partners shall employ any of the moneys or effects of the said partnership, or engage the credit thereof, except upon account of the said partnership."

It had recently been discovered by the Plaintiffs that the Defendant had extracted from the partnership books a list of the names and addresses of the customers of the firm, and in consequence of this the Plaintiffs commenced the present action against him.

It was admitted that the Defendant intended after the expiration of the partnership to make use of the information thus extracted from the books to aid him in carrying on a similar business in competition with the Plaintiffs.

The motion was heard before Mr. Justice *Stirling* on the 18th of January, 1895.

Hastings, Q.C., and *O. L. Clare*, for the Plaintiffs:—

The Defendant is committing a breach of the articles in making these extracts during the continuance of the partnership.

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Under the articles the goodwill of the business is the sole property of Mrs. *Trego*, and, in the case of the Defendant's death during the partnership, his executors would only be entitled to his share of profits and capital, yet, if it be rightly contended that he can do what the Plaintiffs seek to restrain him from doing, his executors would be entitled to sell the information obtained by him as a partner to a stranger.

It will be said that this case is covered by the decision in *Pearson* v. *Pearson* (1); but in that case there was no provision that any one partner should be absolutely entitled to the goodwill.

[STIRLING J.:—If *Labouchere* v. *Dawson* (2) be not law, I have difficulty in seeing what "goodwill" can be.]

Under the provisions of the articles the partners are entitled to make extracts from the books only for the purposes of the partnership. During the partnership the Defendant could have no right to solicit the customers of the firm for his own private advantage, and he has no right to make extracts from the books with a view to doing so after the close of the partnership. After dissolution he would not be entitled to make extracts for this purpose, and it cannot be said that he is entitled to do so in advance. It is not sought to restrain him from doing anything which the Court in *Pearson* v. *Pearson* said that a partner might do.

Buckley, Q.C., and *G. Henderson*, for the Defendant:—

The Defendant is acting within his rights. The partnership books and the entries therein belong not only to the firm, but to each individual member of the firm. *Labouchere* v. *Dawson* was clearly overruled in *Pearson* v. *Pearson*, though attempts have been made in subsequent cases to distinguish *Pearson* v. *Pearson*: *Vernon* v. *Hallam* (3). The Defendant would not, after the determination of the partnership, be entitled to say that he was carrying on the old business; but he might carry on a similar business and solicit the old customers and ask them to deal with him instead of his late firm. We do not dispute that at the

(1) 27 Ch. D. 145. (2) Law Rep. 13 Eq. 322.
(3) 34 Ch. D. 748.

close of the partnership Mrs. *Trego* will be entitled to the books themselves; but in the meantime the Defendant is entitled to preserve for legitimate purposes hereafter a record of the customers of the firm. He is clearly entitled to remember the names if he can. Even after the partnership is ended he would be entitled to inspection of the books.

[STIRLING J.:—For the purposes of evidence upon points arising between him and his co-partners, no doubt that would be so.]

The Defendant's position is stronger now than it would be after the close of the partnership.

"Goodwill" does not include the right to keep the customers of the old firm. The Defendant is only doing what he is entitled to do during the partnership with the view of doing hereafter that which *Pearson* v. *Pearson* (1) shews that he is entitled to do. There is no covenant by the Defendant, either express or implied, that he will not keep the list of customers in his memory and use it for the purpose of soliciting them to deal with him.

Hastings, in reply:—

Pearson v. *Pearson* will not be extended. As a member of the firm the Defendant is entitled to inspection of the books, but for partnership purposes only. The retention of the customers of a business is of the essence of goodwill.

[STIRLING J.:—Supposing the partnership were at an end, could you restrain the Defendant from using any knowledge acquired by him as a partner?]

For the purposes of this case that question does not now arise.

Cur. adv. vult.

1895. Feb. 8. STIRLING J. (after stating the facts of the case, and observing that clause 15 of the agreement really gave the parties no more than they would have been entitled to under sect. 24, sub-sect. 9, of the *Partnership Act*, 1890, continued):—

It has been admitted in argument that the Defendant intends,

(1) 27 Ch. D. 145.

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in the event of the partnership coming to an end at the beginning of next year, to use the list which he has extracted from the books for the purpose of soliciting the customers of the firm. The question to be decided is whether he is entitled to make such a use of the list. For the purpose of deciding it, it is necessary to consider what the Defendant will be able to do as of right after the expiration of the partnership.

It is not disputed that the Defendant will then be entitled to carry on a business precisely similar to that now carried on by the partnership, and to do so at premises in the immediate neighbourhood of those where the partnership business is now carried on. He will be entitled to state that he was formerly a partner in the firm of *Tabor Trego & Co.*: see *Hookham* v. *Pottage* (1); but he will not be able to use the name of that firm or represent that the business he carries on is the business of that firm or a continuation of it, or that the Plaintiffs have any interest in it: see *Churton* v. *Douglas* (2).

According to *Labouchere* v. *Dawson* (3) he would not be able to solicit the customers of the present firm to cease dealing with those who may continue the business of the present firm or to give their custom to himself; but that case was overruled by the majority of the Court of Appeal in *Pearson* v. *Pearson* (4), a decision which is binding on me. And I must take it (and indeed it was not disputed in argument) that he will be at liberty to solicit the customers of the present firm.

It is contended, however, that he is not entitled to use for this purpose the list which he has compiled from the partnership books. On this point there is no direct authority.

The general rule as to the obligation of an agent with respect to the use of information acquired while in the employment of his principal has recently been considered by the Court of Appeal in *Lamb* v. *Evans* (5), and is thus stated by Lord Justice *Lindley* (6): "An agent has no right to employ as against his principal materials which that agent has obtained only for his principal and in the course of his agency. They are the pro-

(1) Law Rep. 8 Ch. 91, 95.
(2) Joh. 174.
(3) Law Rep. 13 Eq. 322.
(4) 27 Ch. D. 145.
(5) [1893] 1 Ch. 218.
(6) Ibid. 226.

perty of the principal. The principal has, in my judgment, such an interest in them as entitles him to restrain the agent from the use of them except for the purpose for which they were got."

In a partnership there exists between the partners the relation of principal and agent, but in a peculiar form, for each partner is principal as well as agent; and, consequently, the materials which each partner obtains are obtained, not for the benefit of his co-partners only, but for himself as well. Thus, the books of the partnership between the Plaintiffs and Defendant (in the absence of express stipulation to the contrary) exist for the benefit, not of the Plaintiffs alone, but for the benefit of the Defendant also; and the information and materials there to be found have been obtained, not for the Plaintiffs only, but for the Defendant also. The present case, therefore, does not fall within the terms of the rule thus laid down.

It was said that the right to make copies of and extracts from the books must be confined to the purposes of the business of the partnership, and the notice of motion is framed on this basis. In my opinion, this is much too narrow a view of the right of a partner. Every partner is entitled (as I think) at the very least to make all such extracts from the books as may be proper to enable him to assert his rights as a partner, either against co-partners or third parties, or to protect himself against claims founded on his position as a partner, whether made by his co-partners or third persons; but even this seems too narrow a limit.

In *Aas* v. *Benham* (1) the question arose how far one partner could, during the existence of the partnership, avail himself for his own purposes of information acquired by him as a partner. [His Lordship then referred to the judgments of Lord Justice *Lindley* and Lord Justice *Bowen* in that case, and continued:—]

The test there applied is whether the information is used for the purpose of competing with the firm, by which I understand competing improperly, so as to be liable to account for the profits thereby derived. If this be so, then, upon the expiration of the partnership, the Defendant will be properly entitled to compete with the firm, and will not be liable to account for his

(1) [1891] 2 Ch. 244.

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profits, and, consequently, the test adopted in *Aas* v. *Benham* (1) fails.

The *Partnership Act*, 1890, ss. 29, 30, appears to embody the law as laid down in *Aas* v. *Benham*. Sect. 29, sub-sect. 1, appears (as is shewn by sect. 29, sub-sect. 2) to apply to transactions undertaken during the continuance of the partnership.

Some assistance may, perhaps, be derived from what was laid down by Vice-Chancellor *Turner* in *Morison* v. *Moat* (2). There a partnership had been formed to carry on a business which consisted in the manufacture of a secret medicinal preparation: the secret was the exclusive property of the plaintiffs, who were not bound to communicate it to any of their partners. The defendant, who was a former partner, had, during the continuance of the partnership, become acquainted with the secret, but (as the Vice-Chancellor held) surreptitiously, and without the knowledge or consent of the plaintiffs. An injunction was granted to restrain the defendant from availing himself of the knowledge thus acquired; but the Vice-Chancellor (3) makes the following remarks: "If the defendant, after he became a partner in the concern, openly took part in compounding the medicines and used the secret for the purpose,—if with the knowledge and concurrence of the partners he was permitted to acquire, and did acquire, a full knowledge of the mode of compounding these medicines and of the secret process in the manufacture of them, it would be difficult for any of those partners afterwards to restrain him from using any knowledge so acquired or any secret so disclosed; they would, I think, in such a state of circumstances, be considered to have waived any right to preserve the secret for their separate benefit." *A fortiori* would this be the result, if it had appeared that the plaintiffs had contemplated from the beginning that the defendant would become acquainted with the secret and had not required from him any covenant not to make use of it.

In the present case, the goodwill of the business is the property of Mrs. *Trego*. The partnership agreement contemplates that the Defendant should have the ordinary rights of a partner as regards knowledge of the affairs of the partnership. It

(1) [1891] 2 Ch. 244. (2) 9 Hare, 241. (3) 9 Hare, 262.

contains no express stipulation to prevent the Defendant from competing with Mrs. *Trego* after the determination of the partnership, or from soliciting the customers of the partnership, or from making use of information acquired by him while a partner; all these matters might have been expressly provided for had the parties been so minded, and I am unable to discover any ground for holding that any of such stipulations ought to be implied. The result is, therefore, that the motion must be refused. I confess that I have come to this conclusion with reluctance; but I must add that I should have been reluctant to depart from what was decided in *Labouchere* v. *Dawson* (1). In saying that I am not to be supposed to dissent or differ from the conclusion arrived at by the Court of Appeal in *Pearson* v. *Pearson* (2). It would not be right to do so; and, indeed, I think the decision in *Pearson* v. *Pearson* is more in accordance with the older decisions than is *Labouchere* v. *Dawson*. Still I should have been glad if the Court of Appeal had seen its way to affirm the doctrine of *Labouchere* v. *Dawson*. As it did not, it seems to me the result at which I have arrived is the fair and necessary consequence.

G. A. S.

The Plaintiffs appealed from this decision. The appeal was heard on the 20th of February, 1895.

Hastings, Q.C., *Cozens-Hardy*, Q.C., and *O. L. Clare*, for the Appellants:—

Pearson v. *Pearson*, the case on which Mr. Justice *Stirling* mainly founded his judgment, is entirely distinguishable from the present case, for it only decided that, if a man sells the goodwill of his business, he cannot, in the absence of any covenant to the contrary, be prevented from carrying on a similar business in competition with the business which he has sold, or from soliciting the customers of the old business. But a partner is not entitled to use the books of the partnership except for partnership purposes; he is not entitled to use them to enable him to compete in business with his co-partners. A partner cannot for the purposes of the partnership want to copy

(1) Law Rep. 13 Eq. 322. (2) 27 Ch. D. 145.

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the names of the customers, for they are contained in the books to which he has access. Such a copy could be of use to him only when he had ceased to be a partner and had become a stranger. He could not make such a copy after the partnership was at an end; how can he be entitled to take advantage of his position as a partner to do it during the partnership? Whatever rights a partner has under the articles of partnership belong to him only in the character of partner. It is a material fact that the goodwill is expressly reserved to Mrs. *Trego*. *Lamb* v. *Evans* (1) is very like the present case. The Defendant has no property in the books except for partnership purposes.

Buckley, Q.C., and *G. Henderson*, for the Defendant:—

The right of a partner to make use of the partnership books is not limited to partnership purposes, but extends to any legitimate purpose: *Partnership Act*, 1890, s. 24, sub-s. 9 (2).

The principle of *Pearson* v. *Pearson* (3) applies. It is settled law that the vendor of the goodwill of a business is, after the sale, entitled to carry on a similar business, even next door to the purchaser, and to solicit his old customers to deal with him. This is not a derogation from his grant. But he must not state that he is the successor to the old business, or that he is carrying on the same business. He is entitled to write to his old customers, asking them to deal with him. The fact that *A. B.* was a customer of the firm, and the record of that fact in the books of the firm, is a valuable piece of property, and it belongs equally to every member of the firm. It is admitted that a partner is entitled to record such a fact in his mind; why, then, may he not assist his memory by copying out entries from the books? If the Plaintiffs are right, a man, after ceasing to be a partner, is bound to forget all that he knows about the customers of the firm.

[They were stopped by the Court.]

O. L. Clare, in reply.

(1) [1893] 1 Ch. 218.

(2) Sect. 24: "(9.) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them."

(3) 27 Ch. D. 145.

LORD HALSBURY:—

In my opinion, this appeal must fail. When we analyze what it is which is really in question, it is clear that it is not the use of the partnership books which the Plaintiffs seek to restrain, but the use by the Defendant of the knowledge which has been acquired by him while a partner, so that he shall not avail himself of that knowledge hereafter when he ceases to be a partner and becomes an independent trader. But it is hardly susceptible of argument that, if he may use that knowledge which he has acquired while a partner, and has retained in his memory, he is not entitled to make use of the partnership books which at present are as much his books as they are the books of each of the other partners. The limitation which it is sought to place on that use, namely, that it must be for partnership purposes only, seems to me entirely alien from the question which has been brought before us. Each partner, as a partner, is entitled to every piece of information for any purpose which the partnership books may give him, and indeed the right to that knowledge has hardly been contested. But it is said that, although a partner may have a right to that knowledge, and although, if by an effort of his memory he was able to retain in his mind the names of all the customers, he could not be restrained from using the knowledge so acquired in order to compete with the successors of the firm after the partnership had come to an end, yet he must not assist his memory by copying out that information which he had a right to possess, and which is contained in the books of the firm. It seems to me that when once you give up the principle laid down by Lord *Romilly* M.R. in *Labouchere* v. *Dawson* (1), which is now no longer law, you are compelled to go to this extent, that it is perfectly lawful after a partnership has come to an end for a former partner to start as a rival in trade of his late co-partners and to solicit any customer of the old firm. If it is lawful to do that, and if the partnership books belong to each partner for the purpose of knowing what is in them, and taking copies of them if he pleases, it seems hopeless to contend that, because his object in so doing is to assist him in doing hereafter that which has been

(1) Law Rep. 13 Eq. 322.

C. A. 1895 TREGO v. HUNT.

determined to be perfectly lawful, he must not look at or take copies of them for the purpose of enabling him to do that which is lawful. I therefore agree with the judgment of Mr. Justice *Stirling*, and I think that this appeal ought to be dismissed with costs.

LINDLEY L.J.:—

I am of the same opinion. The Plaintiffs ask for an injunction to restrain the Defendant from making, or causing to be made, any copy or extract of or from the books of the partnership existing between the Plaintiffs and the Defendant for any purpose other than the purposes of the business of the partnership, and from otherwise committing any breach of the articles. [His Lordship read clause 15 of the partnership articles, and continued:—]

I agree that that clause only expresses what is the ordinary law of partnership, whether expressed or not. But it shews that the partners had their attention called to this matter, and that they have agreed to embody that provision in the articles. It is said that that clause is controlled by clause 20. [His Lordship read clause 20.]

Taking these two clauses together, I cannot possibly construe clause 20 as preventing a partner from reading the partnership books or taking extracts from them. He has a right to use the books for any purpose which is not illegitimate or illegal. If it could be proved that the use which he intended to make of these copies was adverse to the interests of the firm, or an infringement of the rights of his co-partners, I could understand this application, but neither of those propositions can be established. It is not pretended that the Defendant is about to make any use of these extracts which will be detrimental to the firm. He does not intend to make any use of them until the firm shall have come to an end. It cannot now be said with truth that he is going to use the copies or extracts in any way which will infringe the rights of the other partners. So long as *Labouchere* v. *Dawson* (1) stood unimpeached that might have been said; but that case has been overruled by *Pearson* v. *Pearson* (2).

(1) Law Rep. 13 Eq. 322. (2) 27 Ch. D. 145.

I regret it, but so it is. *Labouchere* v. *Dawson* (1) is no longer law, and, that being so, it appears to me that the groundwork of the present application is entirely cut away, and I do not see how we can, consistently with established principles, differ from the view taken by Mr. Justice *Stirling*. In my opinion this appeal fails, and it must be dismissed with costs.

A. L. SMITH L.J.:—

I am of the same opinion. A partner, as long as he remains a partner, is entitled to the information contained in the partnership books. *Primâ facie* that is his right so long as he does not seek the information for the purpose of doing an injury to the firm, or for an illegal purpose. But no such considerations arise in this case, because, as was held in *Pearson* v. *Pearson* (2), the object for which the information in question is sought by the Defendant is a legal one, and there is no pretence for saying that, so long as the partnership exists (and it will come to an end at the close of this year) the Defendant will do anything to injure his partners. It seems to me, therefore, that the Defendant is only doing that which the law permits him to do. No doubt he intends, when the partnership has come to an end, to solicit the old customers, so that he may obtain them as customers of the business which he intends to set up for himself, but, as I have already pointed out, *Pearson* v. *Pearson* shews that this may be done and is not prohibited. Therefore the ground of this appeal fails, and the judgment of Mr. Justice *Stirling* is correct.

Solicitors: *R. Miller, Wiggins & Naylor; H. J. Mannings.*

(1) Law Rep. 13 Eq. 322.

(2) 27 Ch. D. 145.

W. L. C.

C. A.
1895
March 1.

In re DARTNALL.
SAWYER *v.* GODDARD.

[1894 D. 2262.)

Trustee—Cestui que Trust—Reversionary Legatee—Information as to Investment of Testator's Estate—Solicitor and Client—Costs—Personal Order against Solicitor—Rules of Supreme Court, 1883, *Order* LXV., *r.* 11.

The Plaintiff, being beneficially entitled under a will to a one-ninth share of a sum of £900 expectant on the death of a tenant for life, demanded from the trustees of the will particulars of the investments of the testator's estate. The estate was amply sufficient for payment of the legacy:—

Held, that the trustees were bound to furnish such particulars.

The Plaintiff's solicitor having shewn unreasonable haste in commencing litigation, the application for particulars was granted without costs as between the parties, but an order was made against the solicitor, under Order LXV., rule 11, that he should be disallowed his costs against his client.

THIS was an appeal from a decision of Mr. Justice *North* in Chambers.

William Dartnall, by his will, dated in 1891, appointed the Defendants, *E. Goddard* and *W. F. G. Roberts*, executors and trustees thereof, and devised and bequeathed his real and personal estate to his trustees upon trust for sale and conversion, and after payment of his funeral and testamentary expenses and debts and legacies, upon trust to pay the income of the trust moneys to his wife for life, and after her death to hold the said trust premises and the income thereof upon trust to divide the sum of £900 equally between the children of the testator's cousin, *T. Dartnall*, living at the testator's death. And the will contained a direction that the trustees should permit the testator's personal estate invested at his decease in or upon any stocks, funds, shares, or securities whatsoever yielding income to continue in the same state of investment so long as they should think fit, but, subject to such discretionary power, should invest the residue of the said moneys standing in their names or under their control, and the trustees were empowered to vary the investments at their discretion.

The testator died on the 23rd of July, 1894, and his will was proved on the 17th of August, 1894.

At the date of his death there were living nine children of *T. Dartnall*, of whom the Plaintiff, Mrs. *Sawyer*, was one.

At this date the testator's widow was aged eighty-four.

The personal estate of the testator was valued at £12,286 12*s*. The funeral and testamentary expenses, debts, and legacies payable in priority to the £900 were of a trifling amount.

On the 26th of November, 1894, the Plaintiff through her solicitors, Messrs. *Mear & Fowler*, wrote to the Defendant *Goddard* for information as to the £900 bequeathed by the testator's will, and inclosed a list of questions to be answered by him.

The Defendants' solicitors, Messrs. *Nield & Strouts*, having first ascertained that the Plaintiff's reason for requiring the information was to enable her to mortgage her interest under the will, and that she did not contemplate taking hostile proceedings against the Defendants, replied that they were prepared to give such information as their clients might be reasonably required to give upon the usual terms, and, upon receiving £1 11*s*. 6*d*. for their charges, they supplied the Plaintiff's solicitors with answers to the questions submitted to them. The 3rd question was as follows: "Please state how the £900 bequeathed to the children of *T. Dartnall* is invested."

The answer was as follows: "There has been no appropriation of securities, nor is it necessary or desirable there should be until the life tenant of the whole estate dies."

On the 8th of December the Plaintiff's solicitors wrote acknowledging the replies to the questions, and the letter continued as follows: "Referring to question 3 and reply thereto, please send us a statement showing the investments forming the trust estate of the testator."

On the 11th of December the Defendants' solicitors replied as follows: "We have seen our client upon your letter of the 8th instant, and he considers that ample particulars have already been given, and therefore will not instruct us to furnish particulars of the present investments. We will say generally that at the date of proof of the will the securities consisted of a variety of foreign railway and government bonds, and also a

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considerable quantity of English railway stock. The amount at which the particular estate was sworn was £12,286 12*s.*, so that you may draw your own conclusion as to the security of Mrs. *Sawyer*. You will have examined the will and will have observed that the executors have a very wide power, viz., that of continuing the investments in the same state as they were at the testator's decease, providing that they yield income. We cannot add to these particulars, which we trust will be now considered satisfactory."

On the 14th of December Messrs. *Mear & Fowler*, on behalf of the Plaintiff, took out an originating summons against the trustees, asking (1.) that they might be ordered to furnish proper particulars and accounts of the real and personal estate of the testator and the investments thereof, and that they might be ordered to sign proper authorities to the railway and other companies in which any part of the trust funds might be invested to supply information to the Plaintiff as to the amount of stock or shares, and in whose name the same stood; (2.) administration of the testator's estate if and so far as necessary; (3.) payment by the trustees of the costs of the application.

On the 20th of December the Plaintiff assigned her interest under the will by way of mortgage to the *Legal Reversionary Society* to secure the sum of £27, and notice of the assignment was given to the Defendants in due course. The summons was resisted by the Defendants on the ground that the Plaintiff had received all the information to which she was entitled.

The Defendant *Roberts*, in an affidavit in opposition to the summons, deposed that he called upon the Plaintiff to endeavour to persuade her to abandon the proceedings, and that in reply the Plaintiff said that it was Mr. *Mear* (to whom she had gone for an advance of money, and through whom she received £20) who advised her to take the proceedings, and that before she would authorize the proceedings he had expressly said that the costs would come out of the estate.

This was not denied by the Plaintiff. Mr. *Mear*, however, denied that he advised the Plaintiff that the costs of the proceedings would come out of the estate, though he told her that in his opinion the refusal of the trustees to give particulars was

unreasonable, and that the Court would probably visit them with the costs of proceedings to obtain same.

The summons was heard before Mr. Justice *North* in Chambers on the 28th of January, 1895.

The learned Judge was of opinion, first, the application ought not to have been made, and, secondly, that it was made too soon. He accordingly dismissed the summons, with costs to be paid by the Plaintiff. He also made an order under Order LXV., rule 1, that Messrs. *Mear & Fowler*, the solicitors to the Plaintiff, should be disallowed their costs of the application against her, and should repay to the Plaintiff the costs directed to be paid by her to the Defendants; but the summons was to stand over for a week in order to give the Plaintiff's solicitors an opportunity of shewing cause why they should not be made personally liable for the costs.

The Plaintiff and her solicitors, Messrs. *Mear & Fowler*, appealed.

Cozens-Hardy, Q.C., and *E. C. Macnaghten*, for the Appellants:—

(1.) The Plaintiff requires a list of the investments of the testator's estate in order to enable her to mortgage her legacy to the best advantage. A legatee has a clear right to information at his own cost as to what the testator's estate consists of: *Ottley* v. *Gilby* (1); and it is immaterial that his interest under the will is reversionary: *In re Tillott* (2). It is a duty of a trustee to give to all his *cestuis que trust* on demand all particulars as to the trust fund and as to the mode of dealing with it: *Low* v. *Bouverie* (3), *per* Lord Justice *Lindley*.

(2.) The Plaintiff's solicitors ought not to have been made personally liable for all the costs. In order to justify a personal order against a solicitor under Order LXV., rule 11, there must be proof of some misconduct or negligence on his part: *In re Bradford* (4).

Micklem, for the Respondents:—

The Plaintiff was not entitled to any further information,

(1) 8 Beav. 602.
(2) [1892] 1 Ch. 86.
(3) [1891] 3 Ch. 82, 99.
(4) 15 Q. B. D. 635.

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having regard to the amount of the legacy and the value of the estate. There was no suggestion that the estate was in any danger of being insufficient for the payment of the legacy.

Assuming that the Plaintiff was entitled to the information she required, it was unreasonable to commence these proceedings without any further communication with the trustees.

Cozens-Hardy, in reply.

LORD HALSBURY:—

I confess I have the greatest possible difficulty in apportioning the blame which appears to me to rest on both sides. In the first instance the application made on behalf of the Plaintiff for particulars of the trust estate and the investment thereof was, in my opinion, a just and proper one, and ought to have been granted. I see no reason why the trustees should not have granted it. They did not base their objection upon the fact that the application was made within five months of the testator's death, and I am wholly unable to understand what their objection was. If the matter stopped there, I should have thought that the Court ought to have made an order directing the trustees to supply the required particulars and to pay the costs of the application. But the matter does not stop there. The parties get into a correspondence, and within three days of the last letter of the trustees an originating summons of a hostile character is taken out against the trustees, and the Court is asked to order the trustees to pay the costs of it. Then, when the parties go before the learned Judge, the trustees stick to their original position. They still adhere to the view that they have given the Plaintiff adequate information, and they make no offer to give her any more. I think that, although the matter was a small one, the Plaintiff was entitled to the information she sought. I confess I am not quite able to understand the learned Judge's decision. Both parties had been unreasonable; but the learned Judge dismissed the summons with costs against the Plaintiff, and ordered that the Plaintiff's solicitors should not only be disallowed all costs against the Plaintiff, but should repay all the costs incurred by her. I do not think that that is

a reasonable use to make of Order LXV., rule 11. I think we should discharge the order of the learned Judge, and should order the trustees to supply the particulars asked for. Then I am disposed to think, considering the circumstances under which this litigation has been commenced, that we should make no order as to costs either here or below, except that the Plaintiff's solicitors shall be disallowed all costs against her. For although I do not think it was right to order these solicitors to pay costs in this case, I think that they are not entitled to get any costs from their client.

LINDLEY L.J.:—

The difficulty here is to do justice as to the costs, which must now be very considerable. I think it was unfortunate, to say the least, that the trustees' solicitors wrote that letter of the 11th of December, 1894, which was in effect a refusal to give any further particulars. I do not myself think that any injustice was done to the Plaintiff, because I do not believe that practically she wanted information as to the investments of the trust estate; but the conduct of the trustees shews that they were unreasonable, because in strict right the Plaintiff was entitled to the further information which she asked for. But then this summons was immediately taken out without any further communication with the trustees or their solicitors, and it was a very hostile summons. In my opinion the order of Mr. Justice *North* went too far, though I think he was quite right in endeavouring to save the testator's estate from the costs of this litigation. I think the right order will be as follows: Discharge the order of Mr. Justice *North*. Direct the trustees to give a list of the investments of the testator's estate. No order as to costs either here or below, except that the Plaintiff's solicitors be disallowed all costs as against her.

A. L. SMITH L.J. concurred.

Solicitors for Plaintiff: *Mear & Fowler.*
Solicitors for Defendants: *Nield & Strouts.*

H. C. J.

CHITTY J.

1895

Jan. 18, 23, 24.

ROOKE *v.* DAWSON.

[1894 R. 2260.]

Charity — Administration — Announcement of Scholarship — Contract or Invitation—Refusal to elect—Action by Candidate—Consent of Charity Commissioners—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137) *s.* 17.

A trust deed provided that a scholarship should be awarded to the pupil leaving the *M. School* and going to *University College, London*, who should pass the best examination in subjects to be determined upon from time to time by the duly appointed examiners for the scholarship; the trustees announced an examination for June, 1894, which was held by a duly appointed examiner, and in which the Plaintiff obtained the highest number of marks. The announcement of the examination contained no offer or statement that the scholarship would be awarded to the pupil who passed the best examination. The trustees having declined to award the scholarship to the Plaintiff, this action was commenced against them claiming a declaration that the Plaintiff was entitled to the possession and enjoyment of the scholarship, and an order directing the Defendants to put the Plaintiff in possession:—

Held, that the trusts of the deed could not be imported into the announcement of the examination; that there was nothing in the nature of a contract between the Plaintiff and the trustees, and that, as the Plaintiff's alleged individual equitable right involved the partial execution or administration of the charitable trusts, the certificate of the Charity Commissioners was necessary before the action could be proceeded with.

Rendall v. *Blair* (1) discussed and explained.

Motion.

The Plaintiff in this action claimed a declaration that he was entitled to the possession and enjoyment of a scholarship founded by a trust deed of January, 1854, of which the Defendants were the present trustees; the only question raised by the present application was, whether the certificate of the Charity Commissioners, pursuant to sect. 17 of the *Charitable Trusts Act*, 1853, was necessary before the action could be proceeded with. The facts material for the purposes of this report, as set forth in the statement of claim, were as follows:—

By the deed of January, 1854, it was provided that the trustees for the time being should at all times thereafter stand possessed of a capital sum of £1000, and the securities or property in or

(1) 45 Ch. D. 139.

upon which the same might from time to time be invested, as a fund or endowment for the support of a scholarship in connection with the *Protestant Dissenters' Grammar School* at *Mill Hill, Hendon*, in the county of *Middlesex*, to be called the *Bousfield Scholarship*, upon the trusts and subject to (amongst others) the following rules: (1st.) That the scholarship should be of the value of such net yearly income as the said capital sum of £1000 when invested should produce. (2nd.) That it should be tenable for three years from the time of the scholar elect entering at one of the colleges thereinafter mentioned, provided he should continue his studies at such college as aforesaid. (3rd.) That the holder should pursue his studies during such three years at *University College, London* (or, if intended for the ministry), either there, or at *New College, London*, and, on his ceasing to do so, he should forfeit and vacate the scholarship for the then unexpired portion of the three years, and the scholarship should, on such forfeiture, be again bestowed as thereinafter provided. (6th.) That on any avoidance thereof, except as in the 8th rule mentioned, the scholarship should be awarded to the pupil leaving *Mill Hill School*, and going to such college as aforesaid, who should pass the best examination in subjects to be determined upon from time to time by the examiner or examiners for the scholarship. (7th.) That the examination should be held at some time within the first seven days of June. (8th.) That when any vacancy should occur, by death or other means within a period of three years from the last avoidance of the scholarship, if no half-yearly payment should have become due to the scholar elect so avoiding it, then the next highest boy at the last examination who was duly qualified to hold the scholarship should succeed thereto, but if there should be no such boy, or if any half-yearly payment should have been made or become due to the scholar so avoiding the scholarship, the scholarship should remain vacant till the following June. (9th.) That the examiner or examiners for the scholarship should from time to time be chosen by the trustees for the time being, subject to the approval of the committee of the said school.

In June, 1893, the scholarship having become vacant, an examination was held by examiners duly appointed in accordance

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with the provisions of the trust deed; at this examination the Plaintiff and three other duly qualified candidates presented themselves, and as the result of the examination, the Plaintiff was placed third in order of merit.

In September, 1893, the candidate who had been placed first in the examination resigned the scholarship; but the Defendants did not give notice of such resignation to the next highest candidate, nor award him the scholarship; but they announced instead that another examination for the said scholarship would be held in the year 1894.

An examination was accordingly held in June, 1894, by a duly appointed examiner, and at this examination two duly qualified candidates presented themselves, namely, the Plaintiff and another. The Plaintiff passed the best examination, obtaining 570 marks, while the other candidate obtained only 496 marks. The Plaintiff duly entered as a student at *University College, London*, on the first day of the October term, 1894, and was still pursuing his studies at that college.

By a deed poll of November, 1894, the candidate who had been second in the examination of June, 1893, renounced and disclaimed all title to or interest in the said scholarship.

The Plaintiff submitted that, under the circumstances above stated, he was entitled to the enjoyment of the said scholarship, and he alleged that he had applied to the Defendants to award the same to him accordingly, but that the Defendants refused to award the said scholarship to him, or to recognise any right or title of the Plaintiff in or to the same.

The Plaintiff, after alleging his willingness to perform and fulfil all the conditions of holding, and enjoying the scholarship, claimed "A declaration that under the circumstances above stated he is entitled to the possession and enjoyment of the said *Bousfield Scholarship*, subject to his performing the conditions in the above stated indenture expressed."

"An order directing the Defendants forthwith to put the Plaintiff in the possession and enjoyment of the said scholarship accordingly."

The writ was issued on the 18th of December, 1894, the footnote stating that the Defendants were sued as trustees.

The Defendants now moved to stay all further proceedings, on the ground that an order or certificate of the Charity Commissioners, authorizing the action, had not been obtained under sect. 17 of the *Charitable Trusts Act*, 1853.

Farwell, Q.C., and *Micklem*, for the Defendants:—

The proper way of raising this objection appears to be by a motion to stay proceedings: *Hodgson* v. *Forster* (1).

The only interest of the Plaintiff is as an object of the charity, and the claim involves a partial administration; the consent of the Charity Commissioners is, therefore, necessary: *Braund* v. *Earl of Devon* (2); *Benthall* v. *Earl of Kilmorey* (3).

The fact that administration is not expressly asked for by the statement of claim makes no difference, because that claim, in effect, asks to receive the funds of the charity: *Tudor's* Charitable Trusts (4). [*Blandford* v. *Thackerell* (5) was also referred to.]

The judgments of Lords Justices *Bowen* and *Fry*, in *Rendall* v. *Blair* (6), are not intended to overrule *Braund* v. *Earl of Devon*; the basis of these judgments is contract, a common law right, and the remedy for breach of it. No contract is pleaded or hinted at in the claim; nor that there was any implied promise to give the scholarship to the boy who obtained the highest marks, as in *In re Nettle's Charity* (7); no such promise or contract can be imposed as was done in *Spencer* v. *Harding* (8), or *Carlill* v. *Carbolic Smoke Ball Company* (9). The claim makes out an individual equitable right, which involves the construction of the trust deed, and, therefore, the partial administration of the charity. All further proceedings should, therefore, be stayed until the consent of the Charity Commissioners has been obtained.

Levett, Q.C., and *Wurtzburg*, for the Plaintiff, *contra*:—

The certificate of the Charity Commissioners is not necessary. The object of sect. 17 of the *Charitable Trusts Act*, 1853, was to

(1) W. N. (1877) 74.
(2) Law Rep. 3 Ch. 800.
(3) 25 Ch. D. 39.
(4) 3rd Ed. p. 477.
(5) 2 Ves. 238.
(6) 45 Ch. D. 139.
(7) Law Rep. 14 Eq. 434.
(8) Ibid. 5 C. P. 561.
(9) [1893] 1 Q. B. 256.

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stop actions being commenced against charities for the sake of making costs, and generally to prevent the assets of a charity from being wasted by fruitless and frivolous actions; to protect the charity as was stated in *Holme* v. *Guy* (1). It was never intended to interfere with a private right.

The Plaintiff's case here is founded on a contract with the Defendants, arising out of the notice of an examination to be held, and the conduct of the Plaintiff in coming in to be examined: *Williams* v. *Carwardine* (2). The announcement of the examination tacitly imported the provisions of the trust deed, and constituted an offer to award the scholarship to the boy who obtained the highest marks. As soon as the examiners certified that the Plaintiff was the better of the two candidates, it was just the same as if his name had been inserted in the trust deed, and he can bring an action to assert his individual equitable right.

The Plaintiff is not attempting to administer the charity. The result of the observations of Lords Justices *Bowen* and *Fry*, in *Rendall* v. *Blair* (3), shew that whenever any person can say, "I am an object of the charity," he can maintain an action with reference to the charity, to enforce his individual equitable right, without the consent of the Charity Commissioners, and on this point *Braund* v. *Earl of Devon* (4) is overruled. [*Fisher* v. *Jackson* (5) was also referred to.]

Farwell, in reply:—

The question of contract arising out of examinations was unsuccessfully raised in *Thomson* v. *University of London* (6).

[He was stopped.]

CHITTY J.:—

The Plaintiff asks for a declaration under the circumstances I will mention—that he is entitled to, what is termed, possession and enjoyment of the scholarship in question, and for an order directing the Defendants, who are sued only as trustees, to put

(1) 5 Ch. D. 901.
(2) 4 B. & Ad. 621.
(3) 45 Ch. D. 139.
(4) Law Rep. 3 Ch. 800.
(5) [1891] 2 Ch. 84.
(6) 33 L. J. (Ch.) 625, 635.

him in possession, as it is termed, and enjoyment of the scholarship. "Possession" of the scholarship is not a proper term. Enjoyment of the scholarship means, payment out of the charity estate of some £50 a year from the investments, which, if the Plaintiff is right, he would be entitled to as one of the objects of the charity. "Possession" is used in the statement of claim for the purpose of bringing the case, if possible, within the range of the authorities such as *Holme* v. *Guy* (1). I am referring to cases where the plaintiff is in possession of some real property, and seeks to defend that possession as against trespassers and others. [His Lordship then shortly stated the circumstances under which the action was brought and on which the Plaintiff relied, and continued:—]

For the purpose of bringing the case within the scope of those cases which I have already mentioned, the Plaintiff has argued at the Bar, that he has a case of contract against the Defendants. I have already referred to the circumstance that the Defendants are sued as trustees of the charity, and it would not be right to proceed with the suit in that form, if the case were one of contract binding the Defendants personally to some obligation. It is quite clear that if a person who is a trustee, either of a charity or a private trust, were to order a man to do repairs on the trust property, or employ a servant to sweep out a house part of the trust estate, he would, unless there was something to the contrary in the contract, be personally liable on the contract just as any other of Her Majesty's subjects. It would be in vain for him, unless it was an action for specific performance, to say, I am trustee and I cannot pay you out of the trust fund, and, therefore, I am not liable at all. In fact, the circumstance that he was a trustee would be immaterial.

Now the point made is that there was a contract, such as is found in the cases of an offer of a reward or the like. There, when a public offer is made to all the world, proposing that some service should be done, and the service is performed, there is a contract in point of law. There may be offers not resulting, when the offer is accepted, in a contract. An excellent illustration of that proposition is offered by *Spencer* v. *Harding* (2).

(1) 5 Ch. D. 901. (2) Law Rep. 5 C. P. 561.

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In that case the defendants sent out a circular as follows: "We are instructed to offer to the wholesale trade for sale by tender the stock in trade of" A., amounting to so and so, "and which will be sold at a discount in one lot. Payment to be made in cash." It was held that this did not amount to a contract or promise to sell to the person who made the highest tender. The judgment of the Court was that this was, to use Mr. Justice *Willes'* words (1): "A mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them." Applying the principles of that case to the present, is there a contract? In my opinion there is nothing more than a proclamation that an examination for a scholarship will be held, and there is no announcement that the scholarship will be awarded to the scholar who obtains the highest number of marks. Consequently by coming in and submitting to the examination the Plaintiff did not do that which resulted in a contract. It is plain the Plaintiff could not state that the announcement included the term that the scholarship would be awarded, in all events, to the boy who got the highest number of marks. That would be a most improbable announcement to be made by trustees in the position of these Defendants. But whether probable or not, according to the allegations here, which I understand are true, the announcement was simply the announcement I have stated, and it was not coupled with any statement to the effect that the boy who had the greatest number of marks should have the scholarship.

The learned counsel for the Plaintiff argued that they were entitled to eke out this imperfect statement, on which alone the supposed contract is founded, by reference to the trust deed. But the trust deed is not imported into the announcement of the examination to be held. When the case is considered on its merits, the meaning is, that according to the charity deed, the Defendants were bound to award the scholarship to the boy who had the greatest number of marks. That is a distinct question, and that question necessarily involves the administration of the trusts of the charitable deed—not the administration of all the trusts, for that was not meant by any of the

(1) Law Rep. 5 C. P. 564.

judges who used the term, but what is well known in this Court, the partial administration or execution of the trusts. I am far from saying that if the Plaintiff had made out a case of contract, such as would have justified his suing in an action at Common Law, he could have maintained this claim. But it is not necessary to press that matter now, because I hold that the case presented by the statement of claim, deliberately and carefully framed, does not present a case of contract.

The case presented by the writ is really neither more nor less than this: "I am an object of the charity, and as such I sue for the enforcement of the charitable trusts." That brings the case precisely within *Braund* v. *Earl of Devon* (1). There an attempt was made to present the case in favour of the plaintiff as a private trust, as distinct from a charitable trust, and for that purpose reliance was placed on *Blandford* v. *Thackerell* (2). But in *Blandford* v. *Thackerell* there were two distinct things. There was an attempt on the part of the testator to create a charitable trust, which failed; but there remained a good private trust which was capable of being enforced. As was pointed out by both the Lords Justices in *Braund* v. *Earl of Devon*, the plaintiff's case was neither more nor less than this: "I am an object of the charity." *Braund* v. *Earl of Devon* remains wholly unaffected by the judgment of Lord Justice *Bowen* and Lord Justice *Fry* in *Rendall* v. *Blair* (3), where those two Lords Justices overruled Mr. Justice *Kay's* decision, Lord Justice *Cotton* dissenting. There the plaintiff was the master of a charity school, and he was, as is shewn by Lord Justice *Bowen's* judgment (which was the leading judgment of the two Lords Justices who overruled the decision of the Court below), appointed by contract with managers, whose authority was not in question, to be the schoolmaster, and as such schoolmaster was in possession of the schoolhouse. An important point in the case was the undertaking which the Court of Appeal obtained from the plaintiff's counsel, which was, that they gave up all claim to relief except on the ground that the alleged managers, who were seeking to disturb the plaintiff in the possession of the school-house, had been improperly appointed. The substance of Lord Justice *Bowen's*

(1) Law Rep. 3 Ch. 800. (2) 2 Ves. 238. (3) 45 Ch. D. 139.

CHITTY J. 1895 ROOKE v. DAWSON.

judgment is that the plaintiff was suing by virtue of a common law right. The case resolved itself into this: that the plaintiff was in possession of the school-house. It was immaterial as against an ordinary trespasser whether he had a title or not. He was, by virtue of his possession, entitled at common law to bring his action of trespass, and, by virtue of that common law right, he would be entitled to the equitable remedy by injunction to prevent a threatened trespass. Having regard to the undertaking given, the plaintiff's case, in the result as presented, was: There are trespassers, persons calling themselves managers who are not managers, who are endeavouring to interfere with my common law right which is incident to my possession. Lord Justice *Fry* agreed with that judgment, adding only one word of explanation, and the explanation was that he did not intend to confine the principle of the judgment to cases of common law right only, but extended it to individual equitable rights not relating to the administration of the trusts of the charity. That was, for the purposes of the decision, a *dictum*—a *dictum*, however, in which Lord Justice *Bowen* immediately concurred in a short second judgment. But I take Lord Justice *Fry's* words as they stand, and the point is this: he does not confine the principle to mere common law rights, but he says (carefully guarding himself) that where there is an individual equitable right not relating to the administration of the trusts of the charity, the sanction of the Charity Commissioners would not be required. What exact cases the Lord Justice was referring to it is not necessary for me to consider in detail—possibly the case of an equitable right to specific performance of a contract; and there may be others. Some others have occurred to me, but I do not think it is necessary to pursue the matter further. This proposition was laid hold of by the Plaintiff's counsel to shew that wherever any person can say, "I am an object of the charity," he can maintain an action in regard to the charity without the consent of the Charity Commissioners. In other words, the proposition is forced to this extent, that by this incidental observation, the two Lords Justices overruled the decision of their predecessors in *Braund* v. *Earl of Devon* (1). The Lords

(1) Law Rep. 3 Ch. 800.

Justices did not even mention that case, and had no intention of overruling it.

Coming back to the case before me, I find this case, though of an alleged individual equitable right, is of the nature I have already stated, and does relate to and does involve the partial execution or administration of the trusts of the charity deed.

The result is that, in my opinion, the action cannot proceed without the certificate of the Charity Commissioners, and the motion must be allowed. I will not limit the time, but you must proceed with due diligence.

Solicitors for Plaintiff: *Rooke & Sons.*
Solicitors for Defendants: *Pennington & Son.*

W. C. D.

CUNNACK *v.* EDWARDS.

[1893 C. 1350.]

Friendly Society—Objects of Society exhausted—Unexpended Funds—Charity—Cy-près—Bona Vacantia—Resulting Trust.

In 1810 a society was established to raise a fund, by the subscriptions, fines, and forfeitures of its members, to provide annuities for the widows of its deceased members. In 1830 the rules were revised, and the society conformed to the provisions of the *Friendly Societies Act*, 1829, but the objects of the society were in no way altered. In 1848 *E.* became a member, and remained a member till 1878, when he died a widower. *E.* was the last surviving member. The last honorary member, who on joining disclaimed all benefit of the society for his widow, died in 1879. The last annuitant died in 1892.

The legal personal representative of *E.* having claimed the unexpended funds of the society, amounting to £1250:—

Held, that the society was not a charitable institution to which the doctrine of *cy-près* could be applied, and that on this point the fact that there were honorary members, whose donations were applicable for the benefit of the widows of members, made no difference; that the representatives of *E.*, the surviving member, were not entitled to the funds, neither was the Crown entitled to them as *bona vacantia*, but that there was a resulting trust in favour of the members of the society from time to time, or their respective legal personal representatives, in shares, in proportion to the amounts contributed by each member to the funds of the society.

ACTION by trustees of a fund to obtain the direction of the Court.

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In March, 1810, a society called the *Helston Equitable Annuitant Society* was established at *Helston*, in *Cornwall*, for the purpose, as expressed in its rules, of raising from time to time by the subscriptions of the several persons admitted members thereof, and also by the fines and forfeitures by the rules of the society imposed, a stock or fund for the relief of the widows of the deceased members of that society.

In April, 1830, the rules then in force were revised, and the society subsequently conformed to the provisions of the *Friendly Societies Act*, 1829 (10 Geo. 4, c. 56). By rule 16, it was provided that the moneys arising from subscriptions, fines, forfeitures and otherwise (after defraying the expense of books and other incidental charges) should form the capital stock or fund of the society, and should from time to time be invested by the treasurer, in the names of the trustees for the time being, in some or one of the Government funds, or invested in or advanced on such other security, pursuant to 10 Geo. 4, c. 56, as should be approved of by a majority of the said managing committee, or by a majority of the said society at any of the two general meetings thereafter mentioned, or at any special general meeting to be held as therein provided.

Rule 17 provided that the trustees (who were to be annually elected) should from time to time execute a deed declaring the purpose for which any moneys were laid out. No such deed, however, was ever executed. Rule 35 provided that on the death of any member, after having been admitted four years, and having paid his annual contributions and other payments required by the rules and conformed to the same in all respects, his widow should be entitled to such an annuity as was set forth in the table for that purpose provided, so long as she should continue a widow.

The society consisted of ordinary and honorary members. In 1848, one *T. H. Edwards* became an ordinary member, and remained a member until his death in 1878, when he died a widower, and was the last surviving ordinary member. It appeared that all the other members had predeceased him, except Sir *R. Vyvyan*, an honorary member, and it was believed the only honorary member of the society, who on joining the society

had signed a declaration that his object in joining the society was not that any widow of his should claim any benefit therefrom (to which he altogether relinquished his right), but merely for the encouragement of the society. Sir *R. Vyvyan* died in 1879. No attempt to wind up or dissolve the society had ever been made; the books of the society, prior to 1850, were stated to have been lost.

The rules contained no provisions as to the ultimate disposition of any unexpended funds (if any) after paying all the annuities.

The last annuitant on the society died in 1892.

The legal personal representative of *T. H. Edwards* having claimed the unexpended funds of the society, amounting to £1250 New Consols, the present action was commenced by the surviving trustees of the society against *Edwards'* representative and the Attorney-General, for the purpose of having the disposition of the fund decided by the Court.

The Attorney-General contended, that either the society was a charity, and that the funds were applicable *cy-près*; or, in the alternative, that the funds were ownerless, and went, as *bona vacantia*, to the Crown.

The action came on for trial on the 8th and 9th of May, 1894, when the only point argued was, whether the society was a charity.

Robertson-Macdonald, for the Plaintiffs, the trustees, stated the facts of the case, and disclaimed any beneficial interest.

Farwell, Q.C., and *W. D. Rawlins*, for the Defendant, the legal personal representative of *T. H. Edwards*:—

This is nothing more than a friendly society for the purpose of providing for the widows of its members. A friendly society is not a charitable institution: *In re Clark's Trust* (1); and, therefore, the fund cannot be applied *cy-près*. [They also cited *In re Dutton* (2).]

Ingle Joyce, for the Attorney-General:—

In re Clark's Trust went too far, and is not now good law.

(1) 1 Ch. D. 497. (2) 4 Ex. D. 54.

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A friendly society of this kind may be a charity: *Spiller* v. *Maude* (1); *Pease* v. *Pattinson* (2). Poverty is not a necessary ingredient in all charities. The subscriptions of honorary members go towards providing annuities for the widows of ordinary members; the society is, therefore, partly supported by voluntary contributions, and is therefore a charitable institution, and this fund ought to be applied *cy-près*.

CHITTY J.:—

The Attorney-General claims this fund on one of two grounds, first, that there is a charity to which the ordinary doctrine of *cy-près* applies; and, secondly, that the property falls under the head of *bona vacantia*. I propose to say nothing on the latter point, for that remains to be argued later on, and to deal with the first point only, as to whether this society is a charity. [Having shortly stated the facts, his Lordship continued:—] It appears to me that the society, subject to one point which I will mention in a moment, was a society established for the purpose of providing annuities for the widows of the contracting members, according to the rates that are laid down in the table attached to the rules. I can find in that no charity. There is nothing in the rules to shew, nor is there any evidence, that the widows who were to be provided for, were to be widows of poor persons; indeed, Mr. *Ingle Joyce* in his argument admitted that many of them seemed to have been well-to-do persons.

It is not necessary for me in this judgment to affirm the proposition laid down by *In re Clark's Trust* (3), where Vice-Chancellor *Hall* held that a friendly society was not a charitable institution; it is enough for me to say that, in my opinion, this particular society is not a charity.

I said I would mention one point on which some argument turned on this question of charity, namely, the existence of honorary members. There certainly was one honorary member, Sir *R. Vyvyan*, and there may have been more. I have before me the form of declaration signed by honorary members, on which it is argued for the Attorney-General that the declara-

(1) 32 Ch. D. 158, n. (2) 32 Ch. D. 154.
(3) 1 Ch. D. 497.

tion shews, that not only benevolent persons, but charitable persons, were subscribing for the benefit of the widows of others generally. The declaration states that the object of the honorary member joining the society was, not that any widow of his should derive any benefit therefrom, which was altogether disclaimed, but "merely for the encouragement of the society." So there was at least one member (there may have been more) who relinquished all right, which he otherwise would have had, in favour of his own widow, and left the widows of the other members to be provided for according to the rules. He agreed, in fact, that his subscriptions or donations should go towards forming a fund which would provide annuities for others. It appears to me that this does not shew that the society was a charity. Again, as I have already said, poverty was not made a qualification on the part of any widow to get her an annuity; it was the annuity provided by particular persons who agreed to become members; and I think the fact that one or two, or it may be more, agreed that their widows should not participate in the benefits of the society is not sufficient to make it a charity. No order will be drawn up now, but I will direct the action to stand over on the question of *bona vacantia*, with liberty to amend by adding as parties the legal personal representatives of Sir *R. Vyvyan* (unless they disclaim) and of some ordinary member who died a member of the society.

The representatives of Sir *R. Vyvyan* having disclaimed all interest in the fund, and one *Clarke* having been added to represent the representatives of deceased ordinary members as a body, the action came on for further argument on the 28th of November, 1894.

Robertson-Macdonald, for the Plaintiffs.

Farwell, Q.C., and *W. D. Rawlins*, for the Defendant *Edwards*:—

It was open to the members to deal with the funds as their own; but as they did not do this and *Edwards* was the surviving ordinary member he became entitled to the fund, subject to providing for any existing annuities.

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[CHITTY J.:—There is nothing in the rules shewing this to be in the nature of a tontine society.]

There is nothing in the rules as to the disposition of the funds except to provide for annuities; subject to this, the members for the time being are entitled to the fund and may divide it among them: *Brown* v. *Dale* (1). If the members are entitled, the surviving member is entitled by survivorship. He might have held a meeting under sect. 26 of 10 Geo. 4, c. 56, and voted the fund to himself. If the surviving member is not entitled to the whole fund, then there is a resulting trust for all the members, and we should be entitled to our share—at any rate, to the extent of our subscriptions and fines. It is not a case of *bona vacantia*, and the Crown has no right to this fund.

Tweedy, for representatives of deceased ordinary members:—

There is a resulting trust in favour of all the members in proportion to their contributions and fines.

Ingle Joyce (Sir *R. T. Reid*, A.G., with him), for the Crown:—

This is a case of a fund held by trustees upon a trust without any specific purpose for which it can be applied, with the result that the money belongs to the Crown: *Barclay* v. *Russell* (2); *Colchester* v. *Law* (3). There are no *cestuis que trust*—no beneficiaries; therefore the fund goes to the Crown as *bona vacantia*: *Taylor* v. *Haygarth* (4).

This society was nothing more than a club, in which the members had no transmissible interest: *In re St. James' Club* (5). Whatever the members, or even the surviving member, might have done while alive, when they died their interest in the assets of the club died with them. The earlier deceased members have had all the benefit they bargained for when they joined—their widows have received their annuities. When *Edwards* was alive he and Sir *R. Vyvyan* might have dissolved the society in the statutory way and voted themselves the funds; but they did not do so. As a fact, Sir *R. Vyvyan* was the surviving member, and

(1) 9 Ch. D. 78.
(2) 3 Ves. 424, 435.
(3) Law Rep. 16 Eq. 253.
(4) 14 Sim. 8.
(5) 2 D. M. & G. 383, 387.

his representatives disclaim all beneficial interest; still he had just as much right to this fund as *Edwards*. Under the *Friendly Societies Act*, 1829, s. 26, every member was entitled to a vote on a dissolution, and the Act of 1875 (38 & 39 Vict. c. 60), s. 25, requires the consent of five-sixths of the members, including honorary members.

There is no resulting trust; there was no transmissible interest in any member; they only contracted for an annuity for their widows. All the annuitants have been paid, and the trusts of the fund are now exhausted, and what is left goes to the Crown as *bona vacantia*.

Farwell, in reply:—

This is the case of a resulting trust for persons subscribing for certain objects which do not exhaust the fund. *Barclay* v. *Russell* (1) is explained by Mr. Justice *Kay* in *Republic of Peru* v. *Dreyfus Brothers & Co.* (2), and is only an illustration that the Crown takes if there are no *cestuis que trust*; but we say there are *cestuis que trust* here. *Colchester* v. *Law* (3) is distinguishable. It may be difficult to ascertain who these *cestuis que trust* are; but our contention is that there is a resulting trust in favour of the members who found the money in proportion to their contributions, and that the Crown is not entitled.

Cur. adv. vult.

1895. Feb. 20. CHITTY J.:—

The question is, who, in the events which have happened, are entitled in equity to the funds in the hands of the Plaintiffs, the trustees of the *Helston Equitable Annuitant Society*, which funds represent the remaining property of that society? The only rules of the society in existence, are the revised rules of 1830. The only object of the society was, to raise a fund to provide annuities for the widows of members. The fund was to be raised by the contributions of members, varying according to the age of the member and the age of his wife, where she was younger than he. Certain fines and forfeitures were also imposed, which went

(1) 3 Ves. 424, 435. (2) 38 Ch. D. 348, 357.
(3) Law Rep. 16 Eq. 253.

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to the increase of the fund. According to the evidence, the remaining funds represent contributions only. The last annuitant on the fund died in 1892. On her death, the trusts affecting the fund, according to the rules, were exhausted. The last surviving ordinary member of the society died in 1878; his representative is a Defendant to the action. The rules admitted honorary members; they paid no contributions. The only honorary member outlived the last surviving ordinary member. The representative of the honorary member has disclaimed. The Attorney-General claimed that the society was a public charity in the technical sense of the term, and asked that the funds might be applied *cy-près*. It was impossible, however, to accede to this claim, though it might have afforded a reasonable solution of the difficulties, and have produced the best result for all concerned. I have already decided against the claim. The trustees of the fund very properly disclaim all beneficial interest. The claimants are, first, the representatives of the surviving ordinary member; secondly, the Attorney-General, on behalf of the Crown; and thirdly, the representatives of a deceased member, appointed to represent for the purpose of this hearing all the deceased ordinary members as a body. The claim of the representative of the last surviving member may be disposed of in a few words. The society was not a tontine society, and there is no ground for saying that the fund belonged in equity to the last survivor. There is nothing in the rules, or in any principle of equity, applicable to the case on which this claim can be rested. It was said that the last surviving member might have held a meeting under sect. 26 of the statute of *George* IV., and voted the funds to himself. To this proposition, extravagant as it is, it is sufficient answer to say that the last survivor never attempted to do anything of the kind. The contention for the Attorney-General was that the funds were *bona vacantia*, and that the Crown was entitled to them by virtue of its prerogative. It is in virtue of this prerogative right that the Crown takes the personal estate of a man who, being a bastard, dies intestate without leaving issue. Such a bastard can have no next-of-kin. The Crown's right attaches on proof of the bastardy, and no lawful issue of the bastard—subject, of course, to the right of any

widow he may have left. But in the case of the death intestate of a person born in wedlock, the Crown does not take merely because there is a difficulty in finding the next-of-kin; an inquiry is directed, and sometimes repeated, to ascertain who are the next-of-kin, and it is not until every reasonable step by advertisement and otherwise has been taken that the fund is ordered to be paid to the Crown. The mere fact that there will be great difficulty and expense in ascertaining the equitable owner of a fund is not of itself ground for declaring the Crown entitled. The claim of the person appointed to represent the deceased members generally is founded upon the doctrine of resulting trust. Where a man provides a fund by way of trust for payment of a specified annuity to his widow during her life and makes no further declaration of trust affecting the fund, the beneficial interest in the fund, or so much of it as is not required for payment of the annuity, results to himself. The same doctrine would apply to the case of several persons agreeing to provide and providing such annuities for their widows; there would be an ultimate trust in their favour when the purposes of the fund had come to an end. Nor can I see how any difference could justly be made by reason of their raising by common agreement such a fund in different but prescribed proportions as among themselves. Inasmuch, then, as all the purposes for which the funds of the society were raised by contributions of the members have been exhausted, and there is no indication to be found in the rules as to what was to be done with the funds when the specified purposes were worked out, I am constrained to hold, according to the principles of equity, that the doctrine of resulting trust applies. It is immaterial that no actual declaration of trust was made by the trustees in pursuance of rule 17 of the society. Had any such declaration been actually made, the only trusts which could properly have been declared by the trustee would have been those manifested by the rules. Nor is it necessary to consider what could have been done by a general meeting of the members under sect. 26 of the Act of *George* IV. No such meeting was ever held. My reasons for saying I am constrained to hold that the doctrine of resulting trust applies are to be found in what follows. The books of the society prior

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to 1850 are not forthcoming, and apparently are lost or destroyed. The number of members of the society from the beginning, in 1810, is not known beyond this, that it exceeds several hundreds. The difficulty and expense of ascertaining who were members and who are their legal personal representatives will be enormous. Besides this, inasmuch as the contributions were of varying amounts, the share of each representative in the funds will depend not merely on the amount of the contribution of the member whom he represents, but also on the various amounts contributed during upwards of eighty years by the other members from time to time. It requires no great experience in matters of this kind to foresee, as I do, that in the endeavour to discover who are the persons entitled, the greater part, and probably the whole, of the funds will be consumed in costs. There are no means at my disposal for cutting this Gordian knot. I have been informed that there are other similar cases which may be brought before the Court for decision, and that possibly an attempt may be made to induce Parliament to intervene by passing some Bill; but I know not whether the information is correct. My judgment has been postponed in the hope that the assistance of the Legislature might be invoked; but in this hope I cannot further postpone giving judgment in the action. I therefore make a declaration that in the events which have happened the funds are subject to a resulting trust in favour of the ordinary members of the society from time to time, or their respective legal representatives, in shares in proportion to the amounts contributed by each ordinary member to the funds of the society. The amounts, if any, paid as fines or forfeitures, and the annuities received by widows, need not be taken into account. There must be a direction for necessary inquiries on the basis of the declaration.

Solicitors: *Robbins, Billing & Co.*, agents for *Marrack, Nalder & Hockin, Truro; Hare & Co.*

W. C. D.

NORTH J.
1895
Jan. 17, 18.

In re BOARDS.
KNIGHT *v.* KNIGHT.

[1894 B. 2348.]

Applied. In re Beaumont's Will Trusts [1950] 1 Ch. 462

Will—Construction—Mixed Fund—Realty and Personalty—Rateable Payment of Legacies.

When a testator bequeaths legacies and then bequeaths the residue of his real and personal estate, the legacies are charged upon the real estate or its proceeds, but they are payable primarily out of the personalty, unless the testator directs that they are to be paid out of the mixed fund, in which case they are payable rateably out of realty and personalty.

The *dictum* of *Jessel* M.R. in *Gainsford* v. *Dunn* (1), to the effect that without any such direction the legacies are payable rateably out of realty and personalty, is inconsistent with, and must be taken to have been overruled by, the decision of the Court of Appeal in *Elliott* v. *Dearsley* (2).

SUMMONS by the surviving executors and trustees of the will of *Edward Boards*, who died on the 11th of November, 1878, for the determination of the question, What persons were entitled, and in what shares and proportions, to the sum of £11,428 11*s.* 6*d.* *India* 3½ per cent. stock, standing in the names of the Plaintiffs, being the fund set aside to answer an annuity of £400 directed by the will to be paid to *Catherine Boards*, deceased, the widow of the testator.

The Defendants were, *E. B. Knight*, the residuary legatee under the will; the *Royal Agricultural Benevolent Institution*, a legatee; the devisees in trust and executors of the heir-at-law of the testator, who was also one of his next of kin; and the executrix of the testator's widow.

By his will dated the 9th of January, 1878, the testator appointed *H. A. Knight*, *Thomas Chapman*, and *Alfred Richardson* executors and trustees of his will. After making some specific legacies, he bequeathed unto his wife a legacy of £2000 and a life annuity of £400. He then bequeathed a number of pecuniary legacies, two of which were to charities. And he directed that the said two charitable legacies should be paid in precedence of the other legacies thereby bequeathed out of such part of his personal estate as the law permitted to be appropriated by will

(1) Law Rep. 17 Eq. 405. (2) 16 Ch. D. 322.

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to charitable purposes. He directed that the annuity to his wife should be payable quarterly during her life. And he directed his trustees and executors to purchase, appropriate, and set apart, as soon as convenient after his decease, a sufficient fund or sufficient funds, for answering the said annuity, and that such funds might consist partly of any of the stocks, shares, or securities forming part of his personal estate at the time of his decease, but so nevertheless that his wife should not be prejudiced by reason of the failure of any of his said stocks, shares, or securities set apart to meet the said annuity, and any deficiency occasioned by such failure should be made up out of the capital devoted to such annuity. He directed his executors and trustees, and the survivors and survivor of them, or other the trustees or executors thereof for the time being, to sell his messuages, lands, tenements, and hereditaments, and all his freehold, copyhold, and leasehold estates, as soon as convenient after his decease. And for facilitating the said sales he devised and bequeathed unto his said trustees all his freehold and leasehold lands and hereditaments, and all other his estates not being estates held by him upon any trusts or by way of mortgage, nor being copyhold or customary hereditaments. The testator also directed his trustees and executors for the time being (subject to the discretion thereinbefore given to them as to the said annuity) to convert all his residuary personal effects into money, so soon as conveniently might be after his decease. And he directed them to stand possessed of the net proceeds arising from the sale and conversion of his real and personal estate and effects (after and subject to the payment of his debts and funeral and testamentary expenses, and the said legacies, and after making due provision for the said annuity) upon trust for the Defendant *E. B. Knight.* And, as to the funds and personal effects set apart to answer the annuity thereinbefore bequeathed, he directed that the same, after the death of his wife or the cesser of the said annuity, should fall into and form part of his residuary estate, and be held accordingly upon trust for the *Royal Agricultural Benevolent Institution of Great Britain.*

Alfred Richardson died on the 20th of November, 1890. The testator's widow died on the 5th of April, 1894.

There was evidence that the *India* stock had been purchased partly from the proceeds of the sale of real estate, and partly from pure and impure personalty.

Stewart-Smith, for the Plaintiffs, stated the case.

Swinfen Eady, Q.C., and *Upjohn*, for the residuary legatee:—

The personal estate and the proceeds of the sale of the realty are by the will constituted a mixed or blended fund, and the legacies, including the annuity fund, are made payable out of the whole fund—that is, rateably out of the personalty and the proceeds of the realty. Therefore, even if the personalty was sufficient to pay the charitable legacy, that legacy must fail in the proportion which the proceeds of the realty bear to the personalty: *Roberts* v. *Walker* (1); *Allan* v. *Gott* (2); *In re Stephens* (3).

[NORTH J. referred to *Elliott* v. *Dearsley* (4).]

In *Gainsford* v. *Dunn* (5), Sir *G. Jessel*, M.R., said (6): "The result of the cases is this: that where you find a legacy followed by a gift of the residue of real and personal estate, the word 'residue' is considered to mean that out of which something given before has been taken, and the result is to make the residue a mixed fund, and to charge the legacies proportionally and rateably upon the mixed fund."

The legacy must at any rate abate in the proportion which the impure personalty bears to the pure personalty.

Micklem, for the devisees in trust and personal representatives of the testator's heir-at-law.

Gatey, for the testator's widow.

Cozens-Hardy, Q.C., and *Rowden*, for the charity:—

It is admitted that the legacy must abate in the proportion which the impure personalty bears to the pure personalty.

But, as to the proceeds of real estate, the effect of the will is

(1) 1 Russ. & My. 752.
(2) Law Rep. 7 Ch. 439.
(3) 43 Ch. D. 39.
(4) 16 Ch. D. 322.
(5) Law Rep. 17 Eq. 405.
(6) Ibid. 408.

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only to charge the real estate with the legacies in aid of the personalty. The personalty remains primarily liable. There is no direction to pay the legacies out of the mixed fund.

In *Elliott* v. *Dearsley* (1), Lord Justice *James* said (2): "The rule of rateable payment does not extend beyond the things which the testator has expressly directed to be paid out of the fund. Here the legacies are no doubt charged on the real estate by force of the word 'residue,' but there is no direction to pay them out of the mixed fund. There is, therefore, nothing to disturb the ordinary rule that they are primarily payable out of the personal estate."

That case governs the present, and it is inconsistent with what Sir *G. Jessel* said in *Gainsford* v. *Dunn* (3). The legacy to the charity ought therefore to abate only so far as it was necessary, in order to pay it, to resort to the proceeds of the sale of the realty.

Upjohn, in reply.

NORTH J.:—

In my opinion, under the terms of the will the personal estate is primarily liable to the payment of the annuity fund. [His Lordship read the will, and continued:—]

Having regard to a long series of cases, of which *Greville* v. *Browne* (4) is an example, it cannot be disputed that the direction to the trustees to hold the proceeds of the sale and conversion of the testator's real and personal estate after, and subject to, the payment of his debts and funeral and testamentary expenses and the legacies, and after making due provision for the annuity, upon trust for *E. B. Knight*, has the effect of throwing the legacies and the annuity upon the real estate; but whether they are to be thrown upon the real estate *pari passu* with the personalty, or only in aid of the personalty, if the personalty is insufficient, is not indicated by the words here used. What is the meaning of them? By the will down to this point, the annuity is made payable out of personalty only. Then comes this gift. Con-

(1) 16 Ch. D. 322.
(2) Ibid. 329.
(3) Law Rep. 17 Eq. 405.
(4) 7 H. L. C. 689.

struing the words strictly, the gift is only of the net proceeds of the sale and conversion after something has been taken out of them; it is not a gift of the whole fund subject to certain deductions being made, but it is a gift of the "net proceeds" after certain deductions have been made. There is nothing to shew when those deductions are to be made; that is provided for in another part of the will. I cannot see any direction that these sums are to be paid out of the entire fund. It has been settled by authority that, where the personalty is insufficient, the real estate may be either charged in aid of the personal estate, or there may be a direction to make the payments out of realty and personalty *pari passu*; but I do not see that this gift of what is described as the "net proceeds" can mean the entire proceeds, or anything but what is left after all the other payments have been made. I think those words "net proceeds" are used here in precisely the same sense as that in which Lord Justice *James* used them in *Elliott* v. *Dearsley* (1). I refer to what he said, not as deciding a point of law, but as illustrating the use of language. He said, at the foot of page 329, "The reasonable view of his intention is, that he considered that the mortgages on the estates which were to be immediately sold would be paid out of the proceeds of the sale of those estates, and that the net proceeds only would go into the mixed fund out of which the estates that were not to be sold at once would be exonerated." He there used the words "net proceeds" as indicating what was left after particular payments which had to be provided for had been taken from the gross proceeds; exactly as the same phrase is used in the present case. It seems to me that there is not in these words any direction for the payment of legacies or of the annuity fund out of the net proceeds of the whole; and that being so, *Elliott* v. *Dearsley* is, I think, precisely in point. The annuity is not directed to be paid out of a mixed fund arising from the conversion of the real and personal estates, but out of a sum for which provision has to be made out of the personal estate. There is nothing, in my opinion, in the clause now under consideration to shew more than that if necessary the real estate is to be resorted to in aid of the personalty; I

(1) 16 Ch. D. 322.

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cannot find any words which indicate that payment is to be made out of the real estate and the personal estate *pari passu*. Under these circumstances *Elliott* v. *Dearsley* (1) is directly in point; and so far as the observations of *Jessel* M.R. in *Gainsford* v. *Dunn* (2) are, as they seem to me to be, inconsistent with *Elliott* v. *Dearsley*, I must follow the later decision of the Court of Appeal. I hold that the annuity fund is primarily payable out of the personal estate, and is charged on the real estate only in aid of the personal estate.

An order was made declaring that so much of the annuity fund as was attributable to realty and impure personalty went to the residuary devisee and legatee. An inquiry was directed to ascertain the respective values of the pure and impure personalty at the date of the testator's death, and in case the personal estate was insufficient to pay the legacies in full, an inquiry as to the value of the real estate at the testator's death.

Solicitors: *Rooks, Spiers & Wales; Morley, Shirreff & Co.; C. O. Humphreys, Son & Kershaw.*

(1) 16 Ch. D. 322. (2) Law Rep. 17 Eq. 405; see p. 408.

W. L. C.

MACKINTOSH *v.* POGOSE.

STIRLING J.

1894

Dec. 4, 5, 6.

1895

Jan. 16.

[1890 M. 1677.]

Husband and Wife—Post-nuptial Settlement—Avoidance on Bankruptcy—Property of Wife Settled by Husband—Wife "Purchaser in Good Faith and for Valuable Consideration"—Proviso for Cesser of Husband's Interest on Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 3.

In order to constitute a "purchaser in good faith" within sect. 47 of the *Bankruptcy Act*, 1883, it is sufficient if there be good faith on the part of the purchaser; it is not necessary that both parties to the transaction should act in good faith.

A wife, who was married in 1883, and was then possessed of separate property, after the marriage allowed that property to pass into her husband's hands, but not as a gift, nor as a loan for the purposes of his trade. The husband, having applied part of her property to his own use, settled the residue of it, together with other property of his own, upon trusts under which he took a life interest, with a proviso for the cesser thereof in the event of his bankruptcy. The wife had no notice of any fraud or fraudulent intention on his part.

In an action by the husband's trustee in bankruptcy to set aside the settlement:—

Held (1.) that it was not void under sect. 47 of the *Bankruptcy Act*, 1883; (2.) that to the extent of the wife's property received by the husband, the proviso for the cesser of his life interest was good; and (3.), following *Ex parte Tidswell* (1), that sect. 3 of the *Married Women's Property Act*, 1882, did not apply.

ACTION.

The Plaintiff was the trustee in bankruptcy of the property of *Nicholas Pogose*.

The Defendants were *Margaret Pogose*, the wife of *N. Pogose*, *D. J. Bagram*, and two infant children of Mr. and Mrs. *Pogose*.

D. J. Bagram was the surviving trustee of a post-nuptial settlement executed by the husband in 1884, and in respect of which the Plaintiff in this action claimed (*inter alia*)—

(1.) A declaration that the settlement was void, or, alternatively, was fraudulent and void as against the Plaintiff as to all property of the debtor which was comprised therein.

(2.) A declaration in the alternative that a clause in the

(1) 35 W. R. 669.

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settlement, providing that the life interest of the debtor in the income of the settled property should cease on his becoming bankrupt or insolvent, was void as against the Plaintiff as to the income of the property of the debtor comprised therein, and that the Plaintiff was entitled to the whole of the income of the said property as from the commencement of the bankruptcy.

(3.) An inquiry as to what property of the debtor was comprised in or made subject to the settlement.

Mr. and Mrs. *Pogose* were married on the 27th of February, 1883, no settlement being executed on the occasion of their marriage.

At the date of the marriage the wife was possessed of separate property, and shortly afterwards she accompanied her husband to *India*, where portions of her property were from time to time remitted to her by means of drafts, which she indorsed to her husband under circumstances which, in the opinion of the Court, did not amount to a gift of the property to him, nor to a loan by her to him for the purposes of his trade or business.

The settlement was executed in *India* on the 2nd of June, 1884, and was made between *Nicholas Pogose*, as settlor, the Defendant *Margaret Pogose*, as his wife, and *D. J. Bagram* and *M. P. Gasper*, as trustees. It recited that *N. Pogose* had from time to time borrowed and received from and on account of his wife large sums of money amounting to Rs.51,057, a portion of which—namely, Rs.16,025 or thereabouts—he had invested in his name in the purchase of shares in different joint stock companies and in loans made to certain persons on promissory notes and other securities, leaving a balance or sum of Rs.35,032, which he had used and applied for his own purposes, as appeared from an account annexed to the deed. It further recited that it had been agreed between the parties that *N. Pogose* should assign and transfer the said shares, promissory notes, and securities in which he had invested the Rs.16,025, and the several sums of money secured thereby, to the trustees; and that being unable to pay the balance or sum of Rs.35,032, he had further agreed, in consideration of the said sum of Rs.35,032, to assign and transfer unto the trustees certain other property belonging to him. By the operative part of the deed, the property so agreed to be

settled was assigned and transferred by *N. Pogose*, with the privity and consent of *M. Pogose*, to the trustees, upon trust for sale and investment and to pay the income arising therefrom during the joint lives of *N. Pogose* and *Margaret Pogose* upon their joint receipts; but it was provided that the said *N. Pogose* and *Margaret Pogose* should not have the power to charge, alienate, or dispose of by way of anticipation, his, her, or their share or shares of the said income; and in case the said *N. Pogose* should become bankrupt or insolvent, or should charge, or attempt to charge, or alienate, or dispose of by anticipation, his or any part of his share of the said income, then upon trust to pay the whole income to the said *Margaret Pogose*, upon her separate receipt, and to be free from the debts and control of the said *N. Pogose* or any future husband, but so that she should not have power at any time or under any circumstances to alienate the same, or to dispose or deprive herself of the benefit thereof in the way of anticipation; and from and after the decease of *Margaret Pogose*, in case she should die in the lifetime of *N. Pogose*, then upon trust to pay the income unto *N. Pogose* during his life, yet so, nevertheless, that if he should either in the lifetime of *Margaret Pogose*, or after her decease, become bankrupt, or assign, charge, or otherwise dispose of the said income, or attempt to do so, or suffer any other act or thing whereby the said income, if payable to him absolutely, would become vested in any other person, then, and in such case, the trust thereinbefore declared in his favour should cease as if he were dead. But in case *N. Pogose* should die in the lifetime of *M. Pogose*, then the trustees were to pay the income to *M. Pogose* during the remainder of her life, and from and after the determination of the trust thereinbefore declared the trust property was to go and be in trust for the children of *N. Pogose* and *M. Pogose*.

Subsequently to the execution of the settlement Mr. and Mrs. *Pogose* returned to *England*, and on the 27th of April, 1888, Mr. *Pogose* was adjudicated a bankrupt. The writ was issued on the 16th of July, 1890, and this was the hearing of the action.

Hastings, Q.C., and *Muir Mackenzie*, for the Plaintiff:—

The settlement was not made "in good faith and for valuable

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consideration" within sect. 47 of the *Bankruptcy Act*, 1883, and is therefore void. The good faith required by that section must be good faith on the part of the settlor. In this case the fact that the wife acted in good faith is not sufficient: *In re Ridler* (1); *In re Pearson* (2); *Ex parte Hillman* (3); *Hance* v. *Harding* (4). But if the settlement be not void altogether, then the provision for the cesser of the husband's life interest on his becoming bankrupt is void as against the Plaintiff as to the income of any property comprised in the settlement belonging to him.

Alternatively we say that the settlement falls within sect. 3 of the *Married Women's Property Act*, 1882. Mrs. *Pogose* could not claim in competition with her husband's creditors, and that being so, she cannot claim the benefit of the settlement.

Grosvenor Woods, Q.C., and *Stewart-Smith*, for the Defendants:—

The settlement amounts to a replacement by the husband of the money received by him on account of his wife, and is not therefore invalid under the *Bankruptcy Act*. Mrs. *Pogose* gave valuable consideration for the settlement inasmuch as she thereby released her husband from the balance in which he was indebted to her: *Pott* v. *Todhunter* (5); *Harman* v. *Richards* (6). There is no evidence of any gift by the wife to the husband: *In re Flamank* (7). The Court will have regard to the substance rather than the form of the transaction, and it being clear that the husband was endeavouring by the settlement to replace his wife's money, the Court will protect the settlement to the extent of the wife's property comprised therein: *Lester* v. *Garland* (8); *In re Meaghan* (9); *Whitmore* v. *Mason* (10); *Hammonds* v. *Barrett* (11); *Montefiore* v. *Behrens* (12). The case is not affected by sect. 3 of the *Married Women's Property Act*, 1882: *Ex parte Tidswell* (13).

(1) 22 Ch. D. 74.
(2) 3 Ch. D. 807.
(3) 10 Ch. D. 622.
(4) 20 Q. B. D. 732.
(5) 2 Coll. 76.
(6) 10 Hare, 81.
(7) 40 Ch. D. 461.
(8) 5 Sim. 205.
(9) 1 Sch. & Lef. 179.
(10) 2 J. & H. 204, 214.
(11) 21 L. T. (N.S.) 321.
(12) Law Rep. 1 Eq. 171.
(13) 35 W. R. 669.

[They also cited *Butcher* v. *Stead* (1).]

Hastings, in reply, referred to *Ex parte Mercer* (2) and *Ex parte Taylor* (3).

STIRLING J. (after stating the facts and referring to the terms of the settlement, continued):—

It is said by the Plaintiff that this settlement is void under sect. 47 of the *Bankruptcy Act*, 1883, and as the terms of the settlement clearly shew that there was a settlement of the husband's property as well as of the wife's, it therefore *primâ facie* falls within the said section. But it is contended on behalf of the Defendants that it is a settlement made in good faith and for valuable consideration, and I think that contention is well founded.

In the first place, who is a purchaser for valuable consideration? On this point I have the guidance of the Court of Appeal in *Hance* v. *Harding* (4).

[His Lordship then, upon the authority of that case, came to the conclusion that Mrs. *Pogose*, having by the settlement settled property of her own and released her husband from the balance in which he was indebted to her, must be taken to be a purchaser for valuable consideration. He then proceeded:—]

But was the settlement made in good faith? Here I have not the same clear guidance. In *Hance* v. *Harding* the Court were unanimously of opinion that all the parties had acted in good faith, and it is said that here one of the parties at least (Mr. *Pogose*) did not so act, and that, consequently, Mrs. *Pogose* is not a "purchaser in good faith" within the meaning of the Act. Now, I am of opinion that a person is a "purchaser in good faith" within the meaning of sect. 47 of the *Bankruptcy Act* of 1883, if he himself act in good faith, and it is not necessary that both parties should act in good faith. I come to this conclusion on three grounds—first, because I think that is the natural interpretation of the statute; secondly, because it is in accordance with the principles of those bankruptcy cases decided by the Courts before the passing of the *Bankruptcy Acts*; and,

(1) Law Rep. 7 H. L. 839, 848.
(2) 17 Q. B. D. 290.
(3) 18 Q. B. D. 295.
(4) 20 Q. B. D. 732.

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thirdly, because it is in accordance with the bankruptcy statutes previous to the Act of 1883. Now, as to the first reason. I think the meaning of the words of the 47th section—*i.e.*, "a purchaser or incumbrancer in good faith and for valuable consideration"—is simply this: a person who has for valuable consideration acquired property affected with some infirmity without notice of the existence of such infirmity.

Next, as to the cases before the passing of the *Bankruptcy Act*, 1883. This class of cases is well illustrated by the case of *Kevan* v. *Crawford* (1). I refer to it, not as a binding authority, but merely as shewing the principle on which the Court acts in such cases. That case clearly shews that in settlements before the *Bankruptcy Act*, 1883, it was enough if the purchaser for value had no knowledge of any fraud on the part of the settlor. Lastly, in the case of *Butcher* v. *Stead* (2), the House of Lords held that the words "in good faith" in sect. 92 of the *Bankruptcy Act* of 1869 must be taken to mean without notice that any fraud or fraudulent preference is intended. For these reasons I think that Mrs. *Pogose* must be treated as a purchaser for valuable consideration in good faith, as it does not appear to me from the evidence that she had notice, either direct or constructive, of any fraud or fraudulent intention on the part of the settlor. [His Lordship upon the evidence then further came to the conclusion that the settlement was not made by Mr. *Pogose* with any fraudulent intent, and continuing, said:—]

On these grounds I hold that the post-nuptial settlement must stand, and that the main object of the action fails. There is another question, however, with respect to the alternative contention, namely, that the provision as to the cesser of Mr. *Pogose's* life interest in the event of his bankruptcy is void. The property comprised in the settlement was contributed by the husband and wife. So far as the property contributed by the wife is concerned, the provision as to cesser on bankruptcy is good. As to the husband's property, it is *primâ facie* bad. There is, however, a class of exceptions to this rule, and I am not at present satisfied whether the present case falls within it. On this point, therefore, I desire to reserve judgment.

(1) 6 Ch. D. 29. (2) Law Rep. 7 H. L. 839.

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In this case I have held that the post-nuptial settlement of the 2nd of June, 1884, is a settlement made in favour of a purchaser (namely, Mrs. *Pogose*) in good faith and for valuable consideration within the meaning of sect. 47 of the *Bankruptcy Act*, 1883, and consequently is valid as against the Plaintiff, the trustee in bankruptcy of Mr. *Pogose*.

The further question remains whether the provision in the deed for the cesser of the life interest thereby given to Mr. *Pogose* on his becoming bankrupt is void as against the Plaintiff as to the income of the property of Mr. *Pogose* comprised in or made subject to the settlement. [His Lordship then referred to the facts of the case and the provisions of the settlement, remarking that, under the provisions of the *Married Women's Property Act*, 1882, the property to which Mrs. *Pogose* was entitled at the time of the marriage became her separate estate, and continued :—]

Two questions were argued—(1.) whether the trust was invalid under the general rule of law; (2.) if not, whether it is rendered bad by the provisions of sect. 3 of the *Married Women's Property Act*, 1882?

As regards the first question, the principle is thus stated in a note to *Wilson* v. *Greenwood* (1): "The general distinction seems to be, that the owner of property may, on alienation, qualify the interest of his alienee, by a condition to take effect on bankruptcy; but cannot, by contract or otherwise, qualify his own interest by a like condition, determining or controlling it in the event of his own bankruptcy, to the disappointment or delay of his creditors; the *jus disponendi*, which for the first purpose is absolute, being, in the latter instance, subject to the disposition previously prescribed by law."

There have been many decisions as to the application of this principle to marriage settlements; and it has been long established that if husband and wife both bring property into such a settlement, a trust of the income of the wife's property in favour of the husband until his bankruptcy is good, while a similar trust of the income of the husband's property is bad: see *Lockyer* v. *Savage* (2); *Higinbotham* v. *Holme* (3). If, however, the wife's

(1) 1 Swans. 471, 481. (2) 2 Str. 947. (3) 19 Ves. 88.

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fortune is not brought into settlement, but is paid over to the husband, then it has been held that a trust of the income of the husband's own property in favour of himself until bankruptcy is good to the extent of the wife's fortune received by him: see *Ex parte Cooke* (1); *Ex parte Hodgson* (2); *In re Meaghan* (3); *Higginson* v. *Kelly* (4); *Lester* v. *Garland* (5). The principle of these cases was stated by Lord *Hatherley* when Vice-Chancellor to be as follows: "Looking at all the cases in which a limitation over in the event of a husband's bankruptcy has been supported to the extent of the money received from the wife, I take the principle of the decisions to have been, that where there is a covenant on the part of the husband to settle a definite sum of money, say £10,000, and the husband has received another definite sum, say £5000, as the wife's fortune, the Court has treated £5000 of the £10,000 as if it were identically the wife's money, and has set it off accordingly. That is the case of *Lester* v. *Garland*. And so, in all other cases where the Court can find a definite sum which can be appropriated as the wife's property, it regards it not as the consideration she gives for the rest, but as the identical property which she contributed as her fortune upon the marriage": *Whitmore* v. *Mason* (6). The reported decisions as to post-nuptial settlements are, so far as I have been able to discover, three only—namely, *Montefiore* v. *Behrens* (7), *Hammonds* v. *Barrett* (8), and *Learmouth* v. *Miller* (9). In *Montefiore* v. *Behrens*, decided in 1865, it was held that a settlement of a legacy to which a married woman became entitled during coverture, so as to give her husband a life interest determinable on bankruptcy, was valid as against the assignee in bankruptcy, the ground of decision being that the wife was entitled to an equity to a settlement. If the Court had ordered the fund to be settled, the wife would, according to the ordinary practice, have taken an immediate life interest in the settled fund, and it was considered competent to her, without the intervention of the Court, to take less than she would strictly

(1) 8 Ves. 353.
(2) 19 Ves. 206.
(3) 1 Sch. & Lef. 179.
(4) 1 Ball. & B. 252.
(5) 5 Sim. 205.
(6) 2 J. & H. 214.
(7) Law Rep. 1 Eq. 171.
(8) 21 L. T. (N.S.) 321.
(9) Law Rep. 2 H. L., Sc. 438.

be entitled to and give up such life interest to her husband so long as he remained solvent.

In *Hammonds* v. *Barrett* (1) (decided in 1869), a post-nuptial settlement was made by which £990, the property of the husband, and £4000, the property of the wife's brother, were settled upon trust for the wife for life with remainder for the husband for life or until he should become bankrupt or take the benefit of any Act for the relief of insolvent debtors, or commit or do any act, deed, matter, or thing whatsoever whereby the income should become vested in any other person, with remainder over. The wife died in 1862. In 1866 the husband assigned the income by way of mortgage to secure payment of a bond, and in 1867 became bankrupt; and a question arose under these circumstances whether the assignee in bankruptcy of the husband was entitled to any part of the income of the fund. It was held by Vice-Chancellor *Stuart* that he was not. The Vice-Chancellor's judgment is very shortly reported, and there are some observations in it which, taken literally, might seem to indicate his opinion to be that the settlement was not in any way obnoxious to the bankrupt laws. The judgment, however, concludes thus: "The assignee, therefore, is not entitled to any of the stock, the life interest of the bankrupt having ceased upon the execution of the bond." I think that the question which was decided in that case related to the validity of the gift over upon alienation rather than upon bankruptcy, and if so the decision is in accordance with the cases of *Brcoke* v. *Pearson* (2), *Knight* v. *Browne* (3), and *In re Detmold* (4).

Learmouth v. *Miller* (5) was a Scottish appeal, decided by the House of Lords in 1875. There a post-nuptial settlement was made of the *legitim* or share of the wife in her father's estate, the trust being for the husband for life with remainder to the wife for her life, and subject thereto for the children of the marriage, and those provisions were declared by the deed to be alimentary, and "no wise attachable for debt." The husband subsequently became bankrupt, and it was held that the trustee

(1) 21 L. T. (N.S.) 321.
(2) 27 Beav. 181.
(3) 7 Jur. (N.S.) 894; 9 W. R. 515.
(4) 40 Ch. D. 585.
(5) Law Rep. 2 H. L., Sc. 438.

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in the bankruptcy was entitled to the income of the fund during the husband's life. According to the law of *Scotland* a wife is not entitled to any equity to a settlement (see *In re Tweedale's Settlement* (1)), and the decision does not necessarily govern cases where such a right exists: but I have thought it right to refer to it by reason of Lord *Cairns* making some observations with reference to English law. He says (2): "It is a stipulation with regard to the husband's life-rent use that it shall be in no wise attachable for his debts, but shall be considered alimentary for his benefit. Then the question is, whether a stipulation of this kind in a post-nuptial contract is permissible and valid according to the law of *Scotland*? According to the law of *England* it clearly would be invalid; and my Lords, as I understand the law of *Scotland*, it is invalid equally by the law of *Scotland*. It is an attempt made by an owner of property to place it in such a position as shall prevent his creditors, or his assignee or trustee in bankruptcy or sequestration, from taking it and using it for the payment of his debts. My Lords, I asked whether there was any instance where the owner of property in a contract for valuable consideration could be found entitled to make a provision of that kind. I do not desire, my Lords, to express any opinion whether it could or could not be done; but no instance has, as a matter of fact, been adduced at your Lordships' bar where it has been held valid."

The question on which Lord *Cairns* thus abstained from expressing an opinion appears (to a limited extent at least) to call for decision in the present case. I think that the cases on marriage settlements shew, and *Whitmore* v. *Mason* (3) is an express authority, that the mere existence of valuable consideration does not entitle the owner of property to settle it on himself until bankruptcy. The cases of which *Lester* v. *Garland* (4) is a type, are only apparent exceptions to this rule, for there, as is pointed out by Lord *Hatherley* in the passage cited, the Courts treated the property of the husband as being in substance the property of the wife. On the other hand, I cannot discover any good ground for holding that those exceptional cases are to be con-

(1) Joh. 109.
(2) Law Rep. 2 H. L., Sc. 440.
(3) 2 J. & H. 204.
(4) 5 Sim. 205.

fined to marriage settlements. It seems to me that the principle of them applies (and, indeed, I understand Lord *Hatherley* so to lay it down) in all cases where "the Court can find a definite sum which can be appropriated as the wife's property," and in all such cases that definite sum is to be treated not merely as consideration for the settlement, but as the identical property brought by her into settlement. In my judgment, such a definite sum can be discovered in the present case—namely, the balance of Rs.35,032 mentioned in the settlement of 1884, and, consequently, I am of opinion that to this extent the property settled by the husband must be treated as the property of the wife, and capable of being limited to him until bankruptcy. The question then arises as to the effect of sect. 3 of the *Married Women's Property Act*, 1882, which, so far as material, is in these terms:—[His Lordship read the section, and continued:—]

Now, it was decided in 1887 by Mr. Justice *Cave*, in *Ex parte Tidswell* (1), that this section only applies where money or other estate of the wife has been lent or entrusted to the husband for the purpose of his trade or business. In *Alexander* v. *Barnhill* (2), decided in 1888, the Vice-Chancellor in *Ireland* expressed a contrary opinion, but *Ex parte Tidswell* was not cited, and further the observations of the learned Judge were unnecessary to the decision of the case before him. I have been unable to find any subsequent authority bearing upon the point, and although in *Ex parte Tidswell* the learned Judge appears to have found great difficulty in coming to the conclusion at which he ultimately arrived, I consider myself bound by the authority of that case. Inasmuch then as the fund here in question was not lent or entrusted to Mr. *Pogose* for the purpose of his trade or business, the section does not assist the Plaintiff; but I desire to point out a further difficulty. Part of the separate estate of Mrs. *Pogose* was, no doubt, at one time lent or entrusted to her husband, but it ceased so to be on the execution of the settlement of 1884, and became entrusted to the trustees of that settlement. If, as I have held, this settlement was not open to objection under the provisions of the *Bankruptcy Act*, it is difficult to see that the particular transaction falls within the

(1) 35 W. R. 669. (2) 21 L. R. Ir. 511.

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provisions of sect. 3 of the *Married Women's Property Act*, 1882. The case of *Alexander* v. *Barnhill* (1), to which I have already referred, is an authority that that section does not extend to or affect every kind of dealing between husband and wife.

The Plaintiff is entitled at his own risk to an inquiry as to the value of the property brought into settlement by Mr. *Pogose*, but in all other respects the action fails, and the Plaintiff must pay the costs down to and including the trial.

Solicitors: *Clement Cheese & Green; Nash, Field & Co.*, agents for *Stuckey, Son, & Pope, Brighton.*

G. A. S.

STIRLING J. 1895 *Jan.* 15; *Feb.* 14.

In re HORLOCK. CALHAM *v.* SMITH.

[1894 H. 1183.]

Will—Satisfaction—Debt payable by Testator within three months of Death—Legacy to Creditor of greater Amount—No Time fixed for Payment of Legacy.

A legacy of £400, as to which no time of payment was fixed by the testator:—

Held, not to be in satisfaction of a debt of £300 payable to the legatee by the testator within three months of his death.

In re Dowse (2) followed.

ADJOURNED SUMMONS.

By an indenture made the 3rd of July, 1891, between the testator, *F. G. W. Horlock*, of the one part, and the Plaintiff, *Ann Calham*, of the other part, reciting that there was then due and owing by the testator to the Plaintiff the sum of £300, the testator covenanted with her that his executors or administrators would within three calendar months next after his decease pay to her, her executors or administrators, the sum of £300; and the Plaintiff on her part covenanted with the testator that she would not at any time until after the expiration of three calendar months next after his decease ask, demand, sue for, or take any proceedings to recover payment of the £300.

(1) 21 L. R. Ir. 511. (2) 50 L. J. (Ch.) 285.

The testator made his will on the 31st of July, 1891, whereby he gave all his property to trustees upon trust for his widow for life, and after her decease for the benefit of his two grandchildren, the sons of his daughter, Mrs. *Radcliffe*.

On the 14th of October, 1891, he made a codicil to his will in the following terms: "It is my sincere wish to leave *Ann Calham* as first charge on all property left by me at the time of my decease the sum of £400."

The testator died on the 24th of May, 1892. For some time prior to and down to the date of his death he had allowed the Plaintiff the sum of 30*s*. a week. The Plaintiff deposed, and her evidence was corroborated, that after the execution of the deed of the 3rd of July, 1891, the testator told her that he would leave her more money in consequence of the death of his daughter, Mrs. *Radcliffe*, and in September, 1891, he told her that he would leave her another £400, making £700 in all.

Probate of the codicil being opposed by the testator's widow, the executors instituted an action in the Probate Division, and on the 15th of July, 1893, a decree was pronounced in that action in favour of the will and codicil. The executors having subsequently declined to act, administration with the will and codicil annexed was granted to the Defendant. The Defendant paid to the Plaintiff the legacy of £400, but refused to pay the £300 due to her under the deed of covenant on the ground (*inter alia*) that the debt was satisfied by the legacy.

This was an originating summons taken out by the Plaintiff for the determination of the question whether the debt was so satisfied, and whether the sum of £300 with interest thereon was due to the Plaintiff.

It was further contended that the deed of covenant was invalid for want of proper consideration; but upon this point the case does not call for a report.

Hastings, Q.C., and *S. Dickinson*, for the Plaintiff:—

This case is taken out of the general rule as to the satisfaction of a debt by a legacy of equal or greater amount by the circumstance that the debt is payable three months after the testator's death, whereas the legacy is not payable until twelve months

STIRLING J. 1895 *In re* HORLOCK. CALHAM *v.* SMITH.

have elapsed. Interest would run from these dates respectively, and that is a sufficient difference to rebut the presumption of satisfaction: *Mathews* v. *Mathews* (1); *Nicholls* v. *Judson* (2); *Haynes* v. *Mico* (3); *Clark* v. *Sewell* (4). Moreover, there is parol evidence that the testator did not intend the legacy to be in satisfaction of the debt.

Grosvenor Woods, Q.C., and *Herman Robinson*, for the Defendant:—

In all the cases relied upon in support of the Plaintiff's claim, a time was fixed for the payment of the legacy. Here no time is fixed by the testator, and there is not enough to take the case out of the general rule (5); *In re Fletcher* (6). There is no sufficient evidence to rebut the presumption of satisfaction.

Hastings, in reply, referred to *Horlock* v. *Wiggins* (7).

[STIRLING J. referred to *In re Dowse* (8).]

Cur. adv. vult.

Feb. 14. STIRLING J. (after stating the facts, and coming to the conclusion upon the evidence that the deed of the 3rd of July, 1891, was valid, continued):—

The next defence is that the debt has been satisfied by the legacy given by the codicil.

This raises a very curious point. The general rule is established that where a testator gives to a creditor a legacy of equal or greater amount, that is a satisfaction of the debt. That rule was established early in the last century; but no sooner was it established than learned Judges of great eminence expressed their disapproval of it, and invented ways to get out of it. It was several times referred to in Lord *Hardwicke's* time, and I will mention some of the cases.

The first is *Nicholls* v. *Judson* (9), in which *William Lowe* gave

(1) 2 Ves. Sen. 635.
(2) 2 Atk. 300.
(3) 1 Bro. C. C. 129.
(4) 3 Atk. 96.
(5) 2 Wh. & T. L. C. 6th Ed. p. 405.
(6) 38 Ch. D. 373.
(7) 39 Ch. D. 142.
(8) 50 L. J. (Ch.) 285.
(9) 2 Atk. 300, 301 (decided by *Fortescue* M.R.).

Ann Mansell a bond for £300 and interest in 1728, and in 1731 paid her £100. In 1736 he made his will, and gave all his lands in *B.* for a term of 200 years, upon trust to raise and pay within two years after his death to *Ann Mansell* £200, and also devised other lands to the same trustee for 300 years on trust to pay £200 to *Ann Mansell* within one year after his death. The Master of the Rolls held that these legacies were not a satisfaction of the debt. The material portion of his judgment was this: "In the present case, the testator's directing that the £200 and £200 should not be paid till one or two years after his death, is a very considerable circumstance in favour of Mrs. *Mansell*, and shews strongly, that the intent of the testator was not that it should go in satisfaction of the debt, for the bond was payable immediately, and the testator had no right to suspend the payment of a debt, though he might suspend his legacy; and though executors have a year allowed them to pay legacies, yet that does not extend to debts, but they are liable to be sued the moment after the testator's death; so that the payment of these legacies at a future time is extremely material, and takes this case out of the general rule." He then added other grounds on which he came to the same conclusion. The second case is *Clark* v. *Sewell* (1), in which there was a legacy of the interest of £10,000 to the testator's mother for life, and the question was whether this was a satisfaction of her life interest in a sum of £2000 payable to her by the testator. The legacy was to be paid in a month after the testator's death, and Lord *Hardwicke* said: "There is no pretence to say, that the principal of the £10,000 can be a satisfaction of the principal sum of £2000 to the mother. Nor is there anything in the will that declares this to be a satisfaction of the interest of the £2000. But the point of time it is said is so trifling, it being only a month, that no regard should be paid to it, but though a small one, yet it is a circumstance that the plaintiff has a right to lay hold of, to take this out of the cases that have been deemed a satisfaction. For according to the rule of this Court, a legacy that ought to be deemed a satisfaction must take place immediately after the death of the testator: for the debt, whether of a principal sum

(1) 3 Atk. 96, 97.

STIRLING J. 1895 *In re* HORLOCK. CALHAM *v.* SMITH.

or for interest, is due at the death of the testator, and therefore the legacy must be so too." And a little further on he says: "There is no case to make a legacy a satisfaction of a debt, where the legacy is not due at the time of the testator's death, but is made contingent, and to take place at a future day. I sent for a case from the Register, which I thought like this in substance, though it does not run *quatuor pedibus*, and that is the case of *Crompton* v. *Sale* (1), before Lord Chancellor *King*. I lay no weight upon there not being assets here, because it is owing to an accident there are not; and therefore this case in the reasoning of it comes very strongly up to the present. For whether the postponing the legacy is a month only, or a longer time, it makes no manner of difference. Where the Court decrees a legacy to be a satisfaction of a debt, the Court gives interest always from the death of the testator."

In *Haynes* v. *Mico* (2) a bond had been given upon marriage to secure £300 (the wife's fortune) to the wife within one month after the husband's decease. By will the husband gave her £500, payable within six months after his decease, and it was held that the bequest of £500 was not a satisfaction of the £300 secured by the bond. Lord *Thurlow* was at first apparently of a contrary opinion; but he afterwards changed his mind, and is reported to have said: "In the case of *Clark* v. *Sewell* (3) Lord *Hardwicke* laid down the rule, that where there was a difference, in any circumstance, between a legacy and the debt, the legacy should not be deemed a satisfaction; therefore, in this case the debt being payable in one month, and the legacy in six months, made a clear distinction, and repelled any presumption of an intention in the testator to pay the debt." The earlier cases, two of which I have mentioned, were elaborately considered and reviewed by Lord Chief Baron *Alexander* in *Adams* v. *Lavender* (4). In that case bonds had been given by the husband to secure payment in his lifetime, or immediately after his death, of £500 to his wife, and by his will, after directing payment of his debts, he gave her £1000 payable within six months after his decease. It was held that the £1000 was not a satisfaction of the £500. In

(1) 1 Eq. C. Ab. 205.
(2) 1 Bro. C. C. 129, 132.
(3) 3 Atk. 96.
(4) M'Cl. & Y. 41.

that case the Lord Chief Baron expressed a clear opinion that the decision in *Haynes* v. *Mico* (1) was good law. The next case which I shall mention is one which is not in point, but I refer to it because it forms a strong contrast with the decision which I shall afterwards mention. It is a decision of Vice-Chancellor *Malins* in *Atkinson* v. *Littlewood* (2). There the husband had covenanted to pay an annuity of £52 to a trustee for his wife on four special quarterly days. By his will he gave property to trustees to pay an annuity of £52 to his wife generally on the same special quarterly days. The Vice-Chancellor, evidently very much against his will, felt himself compelled to hold that the bequest was a satisfaction of the annuity. In that case the annuity was payable exactly on the same days, and was in every way as advantageous as the bequest.

It will be observed that down to this point in every decision (although the language of Lord *Hardwicke* goes further) a time had been fixed by the testator for the payment of the legacy. But in the case of *In re Dowse* (3), before Vice-Chancellor *Hall*, that was not so. There a testator who had, for valuable consideration, covenanted by bond to pay an annuity of £10 to *H. D.* "so long as she should continue the widow of *J. D.*," by equal half-yearly payments on the 16th of June and the 16th of December, subsequently by his will bequeathed to her an "annuity of £30 if she should so long continue a widow." And the Vice-Chancellor held that the circumstance that the annuity bequeathed by the will would not according to the ordinary rule of law become payable until a year after the testator's death, while that secured by the bond was payable half-yearly, was sufficient to rebut the presumption that the one was intended by the testator to be in satisfaction of the other. The judgment is very remarkable. He says (4): "I think that the difference in this case between the interest of the annuitant under the bond and under the will, in respect to the times at which she was entitled to call for payment, is such as to prevent me from holding that the one annuity was intended by this

(1) 1 Bro. C. C. 129.
(2) Law Rep. 18 Eq. 595.
(3) 50 L. J. (Ch.) 285.
(4) Ibid. 286.

STIRLING J. 1895 *In re* HORLOCK. CALHAM *v.* SMITH.

testator as a satisfaction or discharge of his liability in respect of the other. The annuity under the will—assuming it to be apportionable under the *Apportionment Act*, 1870—is an annuity which could not become payable until the end of a year after the testator's death, because, supposing the death of the annuitant to take place during that year, and the apportioned part referable to that portion of the year to have accrued due, yet it would not be payable until the end of the year, inasmuch as the *Apportionment Act* makes the apportioned part payable only when, according to the will, the whole would have become payable. That being so, there is a substantial and important difference between these two annuities as regards the time of their payment. It may be questionable whether, for the present purpose, I ought to have regard to the *Apportionment Act*; but I assume that this annuity is apportionable under the Act, and that this testator must be taken to have known the law. Still, however that may be, undoubtedly the fact remains that the annuity under the will is payable at a different time from that secured by the bond." And on that ground he decided that the annuity was not a satisfaction of the debt. He assumes that the *Apportionment Act* applies; so that, even if the annuitant had died during the first year from the testator's death, she would have been entitled to an apportioned part of the annuity from his death; but yet he holds that because that apportioned part was payable only at the end of a year from the testator's death—not by reason of a direction in the will but under the ordinary law—one annuity was not a satisfaction of the other. I have to say whether a legacy as to which no time is fixed is a satisfaction of a debt payable within three months of the testator's death. I join with the many Judges who have disapproved the rule laid down. I equally disapprove of the exceptions which have been grafted on it. But both are binding on me. I take the law as I find it, and finding that Vice-Chancellor *Hall*, in a case very much resembling the present, in a case where no date was fixed for payment of an annuity, held that the rule did not apply, I think I ought to follow him, and I so hold.

But I have also to consider whether the decision is affected

by the parol evidence which has been adduced. I have considered it carefully, and, on the whole, it preponderates in favour of the view that the testator intended the legacy to be in addition to the debt. On these grounds I decide in favour of the Plaintiff that she is entitled to payment of the £300 and interest.

Solicitors: *H. Dobell; W. Hubert Smith.*

G. A. S.

KEKEWICH J.

1894

Dec. 18.

WELLBY *v.* STILL.

[1891 W. 39.]

Solicitor and Client—Lease—Printed Form—Scale Charge—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order.*

Leases following a general printed form and requiring in each case only to be filled in with the names of the parties, the parcels, a plan, the rent, and so forth, are not subject to the scale charges in Part II. of Sched. I. to the rules under the *Solicitors' Remuneration Act*, 1881.

THIS was an action for accounts, brought by the administratrix of *Matthew Batten*, deceased, a *London* builder, against the firm of Messrs. *Still & Son*, who had acted as his solicitors in various building transactions, and in obtaining numerous building leases in pursuance of a building agreement entered into in 1879 between him and one *Ravenhill*, the ground landlord of certain properties in *Rotherhithe*. These leases were all according to a printed form containing blanks for the date, the name of the lessee, the parcels (including a blank in the margin for a ground plan), the rent, and any covenant of a special nature. This form was prepared by the lessor's solicitors before the 1st of January, 1883, when the General Order under the *Solicitors' Remuneration Act*, 1881, came into operation, and in that form eighty-one leases were granted to *Batten* before, and 154 after, that date.

Upon the taxation of Messrs. *Still & Son's* bill of costs against *Batten* relating to these leases, the Taxing Master allowed a charge of one guinea only for each of the eighty-one leases except the first, for which he allowed full charges; and for the 154 leases he allowed a sum considerably less than the scale charge, holding that the scale charge did not apply. Messrs. *Still & Son* then carried in objections to the taxation on the grounds that, as to the eighty-one leases, the proper allowance should not be less than two guineas, and that, as to each of the 154 leases, the full scale charge for "perusing draft and completing lease," under Part II. of Sched. I. to the General Order, should be allowed.

As the Taxing Master refused to entertain the objections,

Messrs. *Still & Son* took out the present summons to review the taxation.

Renshaw, Q.C., and *Yate Lee*, for Messrs. *Still & Son*:—

The Taxing Master has not properly exercised his discretion. As to the leases before the General Order, we should have been allowed more than a guinea a lease; and as to those subsequent to the General Order, the scale charge in Part II. of Sched. I. should have been allowed. The other side will rely on *In re Hickley & Steward* (1) as an authority that the scale does not apply; but here we have in fact done the work to which the scale applies, namely, "perusing draft and completing." Even if it should be considered that the business commenced before the rules came into operation, the taxation should be according to the rules: *In re Field* (2).

Upjohn, for the Plaintiff, was not called upon.

KEKEWICH J.:—

It is quite possible that, if I were treating this matter as *res integra*, I should have allowed the solicitor more than the Taxing Master has done; but I am bound to remember that the Taxing Master is not only far more competent than I am to decide such a matter, but he has had more opportunity of going into all these details than I can have; and, unless I see that a gross error has occurred, I do not think I ought to interfere with his discretion. I give him credit for going into the matter thoroughly and exercising his discretion with care, and even if I did think that something more per lease, or something more for the whole lot, ought to have been allowed, I am satisfied that I ought not now to interfere. So much with regard to the discretion of the Taxing Master.

The other matter is of more importance. What happened was this: Before the General Order under the *Solicitors' Remuneration Act*, 1881, came into operation a number of leases were settled and granted, all in a common and printed form; and leases were also settled and granted after that date, all following that printed form. It is true that the printed form had to be filled in with the names of the parties, the parcels, and so forth, and

(1) 33 W. R. 320. (2) 29 Ch. D. 608

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there also had to be inserted that which all lawyers know, from the litigation that has often ensued from its omission, is essential, namely, a plan, and there was moreover a blank space for any special conditions or stipulations. The question is, When leases were granted in the printed form after the rules under the *Solicitors' Remuneration Act* came into operation, did the lessee's solicitors do the whole of the work for which they claim to be entitled to charge? The whole of the work consisted really in their perusing the draft lease. No solicitor could seriously contend that he ought to be paid the scale charges for merely perusing a printed form. It appears to me that the rule laid down in *In re Hickley & Steward* (1) applies, namely, that the scale in Part II. of Sched. I. to the General Order applies only where the solicitor has substantially done the whole of the work there mentioned. I do not think the solicitors here have done the whole of that work, and therefore they ought only to be paid for the measure and value of the work actually done, and not according to the scale. The matter is one of some importance, and one that may often arise. It did arise in *In re Hickley & Steward,* but only with regard to one lease, the form of which was annexed to the agreement under which the lease was to be granted, and therefore the case did not go quite so far as this; but the principle applicable to both cases is the same, and I should be disposed to hold that where there has been settled once for all a form of lease intended to be followed, and the mind of the solicitor is devoted in the first instance to settling that form (for which therefore he ought to be paid), and where the subsequent settlement of a lease in that form, consisting partly of printed and partly of written matter, is a mere matter of detail and not requiring the exercise of knowledge, skill, or industry, then the solicitor is not entitled to the scale charges.

With regard to the case of *In re Field* (2), I do not think it has any application to the matter in hand.

I therefore refuse the summons with costs.

Solicitors: *Trower, Freeling, & Parkin; R. Chapman.*

(1) 33 W. R. 320. (2) 29 Ch. D. 608.

G. I. F. C.

KEKEWICH J.

1895

Feb. 1.

FARMER *v.* WATERLOO AND CITY RAILWAY COMPANY.

[1895 F. 68.]

Railway Company—Special Act—Underground Railway—Subsoil used apart from Surface—"Appropriate and use"—Tunnel—Easement—"Land"—Purchase—Compensation—Entry on Lands before Agreement—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 3, 18, 68, 84, *&c.*

A special Act (incorporating the *Lands Clauses Consolidation Act*, 1845), authorized a railway company to construct an underground railway, and provided that, with respect to certain lands belonging to the Plaintiff, the company should not be required wholly to take them, but might "appropriate and use the subsoil and under-surface," subject, however, to the liability to make compensation under sect. 68 of the *Lands Clauses Act*.

The company commenced boring through the subsoil of the Plaintiff's land for the purpose of making a tunnel, but without having given him a notice, under sect. 18 of the *Lands Clauses Act*, to treat for the purchase of the subsoil so used:—

Held, that the company were taking not merely an easement, but "land"; that "appropriate" meant "appropriate by way of purchase"; and that therefore they could not "appropriate and use" the subsoil without first complying with the provisions of the *Lands Clauses Act* as to the purchase of land.

Semble, the 84th and following sections of the *Lands Clauses Act*, as to the deposit of purchase-money in case of entry on lands before agreement, apply to the appropriation and user of subsoil under a special Act such as that above mentioned.

THE Defendant company were incorporated by the *Waterloo and City Railway Act*, 1893 (which incorporated the *Lands Clauses Consolidation Act*, 1845, the *Railways Clauses Consolidation Act*, 1845, and other general Acts relating to railways), for the purpose of constructing an underground railway from *Waterloo Station* to *Mansion-house Street, City*; and by sect. 5 they were empowered to "enter upon, take, and use" such of the lands described in the deposited plans and books of reference as might be required for that purpose. Under sect. 7 the mode of construction was required to be by tunnels, and by sect. 8 the motive power for the traffic was to be either electricity or cable traction. Sect. 36 provided that all persons empowered by the *Lands Clauses Consolidation Act*, 1845, to convey lands might

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grant easements; and by sect. 84 landowners might be required to sell parts only of lands and buildings. Then sect. 85 enacted as follows:—

"With respect to the lands described in the second schedule to this Act which the company are by the provisions of this Act authorized to enter on, take, and use for the purposes of the railway and works, the company shall not be required wholly to take those lands, or any part of the surface thereof, or any houses, buildings, manufactories, and premises therein, or any cellar, vault, or other construction held or connected therewith, but the company may appropriate and use the subsoil and undersurface of any such lands; and if the company require to take, use, pull down, or open any such vault, cellar, or arches as aforesaid, they may purchase, take, and use, and the owners of and other persons interested in any such vault, cellar, or arches shall sell, the same for the purposes of the railway and works, and the purchase of any such cellar, vault, or construction shall not in any case be deemed the purchase of a part of a house or other building or manufactory within the said sect. 92 of the *Lands Clauses Consolidation Act*, 1845. But nothing in this section contained, nor any dealing with the lands in pursuance of this section, shall relieve the company from the liability to compensation under the 68th section of the *Lands Clauses Consolidation Act*, 1845, and every case of compensation to be ascertained under this Act shall be ascertained according to the provisions contained in the *Lands Clauses Consolidation Acts*."

The second schedule referred to in sect. 85 described "lands, &c., in respect of which easements only may be taken," the "lands, &c.," being lands with the houses on them situate in the parish of *Christchurch, Southwark*, and some of which belonged to the Plaintiff as tenant for life.

In July, 1894, the Plaintiff received from the company a notice that they required to "appropriate and use" the subsoil under his property as shewn on an accompanying plan, and at a depth not less than there indicated. The plan shewed that the company proposed to construct their tunnel at a considerable depth below the cellars of the houses above. Beyond this

notice the company had not served any notice to treat or paid or deposited any compensation, or given a bond, as provided by sect. 85 of the *Lands Clauses Act*.

The company having recently commenced borings under the Plaintiff's land for the purpose of constructing a tunnel, the Plaintiff commenced this action, and now moved for an interim injunction, to restrain the company from entering upon or under the premises described in the notice, or any other property in the said parish of *Christchurch, Southwark*, belonging to him, until they had complied with the provisions of the *Lands Clauses Act*.

Channell, Q.C., and *Method*, for the Plaintiff:—

The Defendants cannot take the underground slice of our land required for their tunnel without paying for it, and taking the various steps, by notice to treat and otherwise, provided for by the *Lands Clauses Consolidation Act*, 1845, for that purpose. The notice that has been served upon us is not the notice to treat required by sect. 18 of that Act, and therefore no statutory contract is created under it. The word "appropriate" in the special Act does not mean appropriate without payment, for that would be contrary to every principle on which railway Acts are passed. Although the Defendants profess to take an "easement" only, what they really take is an interest in land, a "hereditament": *Metropolitan Railway Company* v. *Fowler* (1); it is therefore within the definition of "lands" in the *Lands Clauses Act*, s. 3. Accordingly they must comply with all the provisions of that Act, subject only to the modification introduced by the provisions of the special Act enabling the Defendants to take the subsoil without the surface above.

Cripps, Q.C., and *Ingle Joyce*, for the Defendants:—

We have adopted the right form of procedure under sect. 85 of the special Act, and have thereby brought ourselves under the protection of that Act. Under that section we have the right to take so much of the subsoil as we require for our tunnel. That portion of subsoil we are not compelled to purchase, but the

(1) [1893] A. C. 416.

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landowner is by the section left to his right to compensation, in case of injury, under sect. 68 of the *Lands Clauses Act*. Considering, however, the great depth of our tunnel, any injury to the land or houses above would be merely nominal. Again, the usual notice to treat under sect. 18 of the *Lands Clauses Act* is not required in a case of this kind, and indeed is inapplicable here. It would only be required if we were taking the whole vertical stratum up to the surface. The notice we gave is not a notice to treat, and was really unnecessary: it was given merely out of courtesy. The provisions of the special Act are in fact intended to supersede the cumbrous machinery of the general Act, and yet to protect the landowner.

KEKEWICH, J.:—

Provisions incorporated by way of exception in a code, such as the *Lands Clauses Act*, are sure to give rise to difficult questions which probably cannot be finally settled without their being discussed in more than one case; but on the particular question which arises here I confess to having no doubt whatever. The railway company are incorporated by special Act in the usual way, which Act incorporates the *Lands Clauses Act*, among other general Acts. They are authorized to take certain lands, including lands of which a lateral stratum only is desired to be taken by them in the present instance; and then, instead of leaving their rights and the rights of the owners of the lands to be governed by the *Lands Clauses Act*, it has seemed good to the Legislature to introduce exceptional provisions. Those exceptional provisions must be read with reference to the general provisions, which are none the less there because the special provisions are there also.

The 85th section of the *Waterloo and City Railway Act*, 1893, on which the question turns, commences thus: "With respect to the lands described in the second schedule to this Act which the company are by the provisions of this Act authorized to enter on, take and use for the purposes of the railway and works." That is the ordinary form of language used in Acts of this kind. If the company desire to enter on, take and use for the purposes of the railway and works any part of those lands in

the ordinary way, they must, of course, proceed, in the absence of agreement, by a notice to treat, to be followed by an agreement for reference to arbitration or a jury, as the case may be. They are entitled to take those lands in that way. But they are also, for their benefit, not bound to take them in that way. Notwithstanding that they do require to use these lands for the purposes of their undertaking, they "shall not be required wholly to take those lands, or any part of the surface thereof, or any houses, buildings, manufactories and premises therein, or any cellar, vault, or other construction held or connected therewith." All those exceptions are directed to the provisions of the *Lands Clauses Act*, which are so familiar that I need not refer to them or to the decisions which have construed them. It is something taken out of the entering on, taking and using for the purposes of the railway; and there is no provision as to what the company is to do if it desires to do less than to enter on, take and use. There is no special provision. Mr. *Cripps* says it is a question of procedure, and therefore I have dwelt upon this for the moment. As at present advised (I do not think it is necessary to decide it), I think that the procedure must be precisely the same, merely changing the language, whether the company enter on, take and use the lands, or take any part of the land, which they could not do without this special provision. No doubt some words would have to be altered, but it seems to me that the provisions of the *Lands Clauses Act* must be incorporated for the one purpose quite as much as for the other.

That, however, is only one point, and one point made by Mr. *Cripps*, and therefore I have dwelt upon it; but the Act goes on to say, "but the company may appropriate and use the subsoil and under-surface of any such lands." Independently of this special provision, of course the railway company could not take the subsoil and under-surface as against the unwilling landowner. Before that enactment he would have been entitled to say, "The land is mine from the centre of the earth to the heaven, and if you take a square inch of it between those two extreme points I will insist on your taking the whole." That would have been his right, and it is on that right that a modification is here

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introduced. What is the meaning of enabling the company to "appropriate and use the subsoil and under-surface"? The definition of the word "appropriate" is to be found in *Metropolitan Railway Company* v. *Fowler* (1), towards the end of the speech of the Lord Chancellor, and also in the speech of Lord *Watson* (2), who says: "To appropriate, according to its natural meaning, is to take and keep a thing by exclusive right; and, as I construe their Act, the authority which it confers upon the company is, to take and exclusively possess as much of the subsoil below highways as may be required for the purposes of the undertaking."

While dealing with that case, I may add that the House of Lords held, as a natural consequence, that what the company had taken was "land." Why the Legislature did not boldly say that the company may "purchase" the subsoil and under-surface of lands, I do not profess to know. That would have been, I think, perfectly intelligible to lawyers familiar with the provisions about mines and minerals in the *Railways Clauses Consolidation Act*, 1845, and also with the Act which enables minerals to be sold with the sanction of the Court apart from the surface, or the surface apart from minerals. In each case an exception is introduced on the general provisions of the law in the same way as an exception has been introduced here on the general statutory provisions.

However, translating the word "appropriate" in the way that Lord *Watson* translates it, it really comes to the same thing as purchase—taking the subsoil for the company's exclusive possession; that is to say, excluding all others and making it their own. There is no possibility of reverter; there is no possibility of any other person having any other claim: it is to belong to the company. Now, why should they not pay for it? Leaving the question of procedure, I bring in the most ordinary principle of law, that no man is allowed to take any other man's property—even when provision is made that he may do so, as in Acts passed for the general public utility—without paying for it. Then Mr. *Cripps* says the company will pay for it by and by if the Plaintiff has been "injuriously affected" within the meaning of the 68th

(1) [1893] A. C. 416. (2) [1893] A. C. 426.

section of the *Lands Clauses Act*, and that he may get some—Mr. *Cripps* intimates extremely small—damages by way of compensation. But the word "compensation," in the 68th section, as is well known, covers "purchase-money," and so it is directly applicable to an appropriation of this kind; and unless the Legislature has in so many words said that the company may appropriate and use the subsoil without paying for it, it seems to me that, according to the most ordinary principles of law, they cannot be allowed to do so.

Therefore, on both those grounds, both turning on the construction, no doubt, of the 85th section of the special Act, I think that the company cannot be allowed in any way to deal with this property except on the terms, in the absence of agreement, of paying a sufficient sum into Court.

There again arises a question which I am not bound to consider, namely, whether this appropriation and user would come within the speedy possession clauses—the 84th and following sections—of the *Lands Clauses Act*, particularly the 85th, the 84th section being more or less introductory to sect. 85. As at present advised, I think it would. I think that procedure would be applicable; but it is not necessary to discuss that question at present.

In my opinion, therefore, the Plaintiff is entitled to an injunction, though not in the form in the notice of motion. The injunction should be to restrain the Defendants from "appropriating and using"—following the words of the special Act—the Plaintiff's land until they have complied with the provisions of the *Lands Clauses Act*.

Upon the parties then consenting to treat the hearing of the motion as the trial of the action,

His Lordship made a declaration that the Defendants were not entitled to take the Plaintiff's land without going through the procedure of the *Lands Clauses Act* as to serving the usual notice to treat, &c. The Defendants to pay the costs of the action.

Solicitors: *Walters, Deverell & Co.*; *S. Bircham.*

KEKEWICH J.

1895

Feb. 22.

"MOROCCO BOUND" SYNDICATE, LIMITED *v.* HARRIS.

[1895 M. 433.]

Copyright—Dramatic Work—Right of Representation—English Proprietor—Foreign Country—Infringement — Injunction — Jurisdiction — Dramatic Copyright Act, 1833 (3 & 4 *Will.* 4, *c.* 15), *s.* 1—*Berne Convention, arts.* 2, 9.

An English Court has no jurisdiction, at the instance of the English proprietor of the performing right of a musical dramatic work of an English author, to restrain a threatened infringement by a British subject in any foreign country comprised in the International Copyright Union.

Under the *Dramatic Copyright Act*, 1833, s. 1, and article 2 of the *Berne* Convention, the English proprietor enjoys in any country of the Union the rights which the law of that country gives to natives of that country; and, therefore, proceedings by him to restrain an infringement in that country by a British subject must be taken in the Courts and according to the law of that country.

THIS was a motion by the Plaintiffs, a limited company, for an interim injunction to restrain the Defendants, *Frederick James Harris* and *Adolphe Henri Chamberlyn*, from performing at any place of dramatic entertainment within the *United Kingdom* (other than the provincial towns and in minor *London* theatres), or in any foreign country which had become a party to the *Berne* Convention, the musical play or dramatic piece entitled "*Morocco Bound*," or any part thereof.

In March, 1893, the piece was written and composed by three English authors with a view to its being produced in *London*. In April, 1893, the authors, by a verbal agreement, granted to the Plaintiffs, who were incorporated in the following month, the sole right of representing the play in the *United Kingdom* for seven years from the 1st of January, 1893, and for all other countries during the full term of the authors' right of representation, subject to the payment of certain royalties. Under that agreement the play was first produced at the *Shaftesbury Theatre* on the 13th of April, 1893, and continued to be performed there, and subsequently at the *Trafalgar Theatre*, until the 10th of February, 1894. The music of the play was first published on the 1st of

June, 1893, and the words of the lyrics on the 13th of April, 1893.

By an agreement in writing, dated the 21st of April, 1893, the Plaintiffs agreed to let to the Defendant *Harris*, then the Plaintiffs' manager, the sole performing rights of the play in the provincial towns of the *United Kingdom* and in minor *London* theatres upon certain terms, and by a memorandum in writing of the same date the authors consented to those terms. Thereupon the Defendant *Harris* gave several performances of the play in the provinces, and the authors received from the Plaintiffs royalties in respect of such performances. On the 20th and 21st of June, 1893, the copyright in the music and lyrics of the play was entered at *Stationers' Hall*.

In January, 1895, the Defendants, *Harris* and *Chamberlyn* (a theatrical agent), advertised their intention of taking a theatrical company abroad on a Continental tour for the performance of the play in *Berlin* and other towns within the *Berne* Convention. The Plaintiffs then, on the 9th of February, 1895, obtained an assignment from the authors of the rights given to them (the Plaintiffs) by the above-mentioned verbal agreement, and forthwith issued a writ in this action for a perpetual injunction, and served a notice for an interim injunction as above mentioned.

In support of the motion an affidavit was filed by Dr. *Cruesemann*, a Doctor of Laws at the University of *Göttingen*, stating that according to the German law the right of performance of a dramatic musical or a musical dramatic work belonged to the author and his successors in right exclusively, and that whoever performed such a work without proper authority was liable to indemnify the author or his successors, and that the remedy for an unauthorized performance was by an injunction from the German Court, and also by a prohibition from the police authorities under local police laws. It appeared that the Defendant *Harris* and his company had, two days previously to the hearing of the motion, left *England* for *Germany*.

Eve, for the Plaintiffs, relied upon the *Dramatic Copyright Act*, 1833 (3 & 4 Will. 4, c. 15, s. 1), and articles 2 and 9 of the *Berne* Convention.

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Scrutton, for the Defendant *Harris*:—

This is a novel application. The Plaintiffs are seeking to enforce a breach in *Germany* of German—not English—law. No authority can be found in the books for the proposition that an English Court can enjoin an Englishman against committing, or inciting persons to commit, a tort in a foreign country. If *Cruesemann's* affidavit is correct, the parties can sue and be sued in *Germany* under the German law.

Cannot, for the Defendant *Chamberlyn*.

Eve, in reply:—

Our English rights are, first of all, established by the Act 3 Will. 4, c. 15. Then the *Berne* Convention gives us such rights in *Germany* as a German would have. If the Defendant *Harris* proceeds with his performances in *Germany*, I may have to apply there; but as he appears here by his counsel and so submits to the jurisdiction, I submit I am entitled to ask the Court to restrain him from stealing our rights.

KEKEWICH J. (after shortly disposing of some minor points, proceeded):—

The point shortly is that I have no jurisdiction to grant the order asked for, so far as it relates to performances in *Germany*. If I had the right to grant it as to *Germany*, then, no doubt, I ought to grant it in a form applicable to any foreign country: it will be sufficient to take *Germany* as an example. What are the Plaintiffs' rights under the Act 3 & 4 Will. 4, c. 15? They have the sole right to represent this piece called "*Morocco Bound*" at certain places specified in the Act—"at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of *Great Britain* and *Ireland*, in the Isles of *Man*, *Jersey*, and *Guernsey*, or in any part of the British dominions." This enactment is strictly limited, according to the universal rule that it is not right to legislate outside the jurisdiction of the Crown—the rule expressed in the old maxim "*Extra territorium jus dicenti impune non paretur*." So far, the Plaintiffs have no right with regard to any performance in

Germany; but they turn to the *Berne* Convention—which I may treat as an Act of Parliament—and they rely upon article 2, which says this: "Authors of any of the countries of the union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives." That means, of course, natives of those countries. *Germany* is one of the countries of the Union. So that the article, applying it to the present case, may be read thus: The Plaintiffs, being authors in *England*, one of the countries of the Union, are to enjoy in *Germany*, another country of the Union, for their work "*Morocco Bound*" the rights which the law of *Germany* gives to natives of *Germany*. When one reads the article in that way, one sees at once that a question of German law arises, namely, what the German law gives to "natives of *Germany*." I assume for the present purpose that Dr. *Cruesemann's* affidavit correctly states the German law on the point, and that the work can, under the circumstances, be protected in *Germany*. Therefore, so far the Plaintiffs have established their right.

Then arises the question, Ought I, in this action, to enforce the Plaintiffs' rights here? The only reason that I can do so is that one or other of the Defendants is in *England* and is a British subject. Mr. *Harris* is to be treated as in *England* and is a British subject, and I can restrain him from doing what is wrong. Why not? It is a matter of ordinary jurisdiction for the Court to restrain one of her Majesty's subjects from infringing the rights of another of her Majesty's subjects. But it is said that Mr. *Harris* is not infringing rights here; that the infringing of the rights is not here, but in *Germany*. What I am asked to do is, not only to enforce the German law, but to enforce that law in *Germany*. Mr. *Scrutton* has challenged his opponent to produce any precedent for going so far, but in vain. No doubt, it is part of the duty of an English Court, in a proper case, to enforce German law—that is to say, enforce it in *England*; and the German Courts will, similarly, enforce English law in *Germany*. But to enforce German law in *Germany* is no more a part of the duty or power of an English Court than it is

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of a German Court to enforce English law in *England*. If these Defendants are not in *England*, they may set any such judgment at defiance, and unless they come to *England* there will be no means of enforcing it against them.

Upon the grounds I have mentioned, I think that really I have no jurisdiction to grant an injunction, which is the only relief asked and the only thing which would be of service to the Plaintiffs. The Plaintiffs' rights are, as I have pointed out, English rights, except so far as they are extended by the *Berne* Convention so as to constitute German rights to be exercised in *Germany*.

The motion must be refused, but the costs of it will be costs in the action.

Solicitors: *Stanley, Woodhouse, & Hedderwick; Steadman, Van Praagh, Sims & Co.*

G. I. F. C.

KEKEWICH J. 1895 *March* 2, 9.

In re KNOX'S TRUSTS.

[1895 K. 07.]

Practice—Vesting Order—Petition—Trustee refusing to Transfer Stock on Request—Petition presented before Expiration of Twenty-Eight Days after Request—Jurisdiction—Costs against Trustee—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 35 (*ii.*) (*d*), 38—*Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.

Jurisdiction to make a vesting order under sect. 35 of the *Trustee Act*, 1893, on the ground that a trustee has refused to transfer stock for twenty-eight days next after a request in writing made pursuant to the section, does not arise before the twenty-eight days have expired, and the Court cannot make an order upon a petition presented sooner.

On petition for such a vesting order the Court has jurisdiction to order the Respondent, the recusant trustee, to pay the costs of the application.

THIS was a petition by *Alfred Charles Cronin*, one of the trustees of the will of *George Knox*, deceased, and the persons entitled to the residuary estate of the testator, alleging that the residuary estate was represented by certain stocks, funds, and securities standing in the names of the Petitioner *Cronin* and the Respondent *William Smail*, as trustees of the will, that an arrangement

had been made between the beneficiaries absolutely entitled thereto to divide and appropriate the stocks, funds, and securities according to a certain scheme, and that a request in writing, dated the 10th of January, 1895, and served on the 14th of January, 1895, had been duly made to the Respondent by the beneficiaries to allot and transfer the stocks, funds, and securities in accordance with the scheme, but that he had refused to do so for twenty-eight days next after such request had been made to him. The Petitioners prayed, first, that the Court would make an order vesting the right to transfer or call for a transfer of the stocks, funds, and securities, and to receive the dividends and income thereof, in the Petitioner *Cronin* either alone or jointly with such other person as the Court might appoint; secondly, that the costs, charges, and expenses of the Petitioner *Cronin* and the Respondent as trustees of the will might be taxed as between solicitor and client; and, thirdly, that the costs of and incidental to the application might be borne and paid by the Respondent.

The petition was presented on the 22nd of January, 1895, and was served a few days afterwards and before the expiration of twenty-eight days from the making of the request; but it was answered for a date after the expiration of that period, namely, the 16th of February.

O. L. Clare, for the Petitioners.

Method, for the Respondent:—

I take the preliminary objection that the Court has no jurisdiction to make an order upon this petition. It is presented under sect. 35 of the *Trustee Act*, 1893, which confers jurisdiction on the Court to make a vesting order only in the case of refusal or neglect by a trustee to transfer "for twenty-eight days next after a request in writing has been made to him," and until the twenty-eight days have expired the jurisdiction does not arise. Here the petition was presented before the twenty-eight days had expired, and the Court, therefore, has no jurisdiction to entertain it. The fact that the twenty-eight days have now elapsed cannot confer jurisdiction. The case is similar to that

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of a magistrate who is entitled by law to a month's notice of action. It is settled that he is entitled to the full time, and that an action brought before the month has expired cannot be maintained: *Young* v. *Higgon* (1).

Clare:—

This is a mere question of costs. If, before the twenty-eight days had expired, the Respondent had intimated his willingness to transfer, no doubt the Petitioners might have had to pay the costs of the application.

[KEKEWICH J.:—According to your view you might have made the request one day, and presented the petition the next.]

Yes; and if he had acceded we should have been in peril as to costs. The matter could be put right by serving the petition to-day and bringing it on next week.

Method:—In that case, I should again make the same objection.

Clare:—If your Lordship has any substantial doubt as to the propriety of the petition, I would ask you to let it stand over with liberty to the Petitioners to present and serve it anew.

KEKEWICH J. asked what jurisdiction there was to order the Respondent to pay costs.

Clare referred to sect. 38 of the *Trustee Act*, 1893 (2) as being not merely a repetition but an extension of sect. 51 of the *Trustee Act*, 1850.

KEKEWICH J.:—

This is a small point and purely technical; but it is of some importance in practice. Sect. 35 of the *Trustee Act*, 1893, gives

(1) 6 M. & W. 49, 54.

(2) Sect. 38 of the *Trustee Act*, 1893, is as follows: "The High Court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be paid or raised out of the land or personal estate in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just." The words "and by such persons" were not contained in the corresponding section (sect. 51) of the *Trustee Act*, 1850 (13 & 14 Vict. c. 60).

a special jurisdiction to the High Court. It provides that "where a trustee entitled alone or jointly with another person to stock or to a *chose in action* . . . neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a *chose in action*, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled, . . . the High Court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a *chose in action*, in any such person as the Court may appoint." That gives a new right of action. It is no doubt to be effectuated by petition in a summary mode; but still it is a new right of action, depending on the statute, and in addition to such rights of action as exist at common law or under other statutes; and the proper principle to apply to it is that a statutory jurisdiction must be strictly construed. It seems to me that the petition cannot be presented—or, to turn it into an action, the writ cannot be issued—until the jurisdiction has arisen; and to say that a man may, after having made a request in writing, immediately present a petition, and then get an order upon that petition when the twenty-eight days have expired, is to say that he may commence process before the jurisdiction has arisen. I do not think that that can be the proper construction of such an enactment as this.

Mr. *Clare* invokes the analogy of an executor against whom an action for administration may be brought, notwithstanding that he has not proved the will, provided that the probate is in Court when the Court is asked to pronounce judgment. That depends on the settled doctrine that the appointment of an executor relates back to the death of the testator. When the probate is granted to him a man is executor as from the day of the testator's death, notwithstanding that the grant may not have been made until a date many months or years later. That is a distinct difference between that case and every other. I think, therefore, that the petition has been presented prematurely.

That is the only point which is really before me for the

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moment. As regards the question of costs, my opinion, subject to anything which may be said in argument to the contrary, is that expressed in a note in Mr. *Ellis's* book, which I have before me. He says (1): "The *ratio decidendi* of *In re Mills' Estate* (2) turned mainly on the fact that the *Judicature Act* was passed after the other Acts then under discussion. The position as regards the *Trustee Act*, 1893, is now reversed, and inasmuch as the above section" (*i.e.* sect. 38) "has been passed by the Legislature with full knowledge of the existing state of authorities, and with the express addition of the words 'and by such persons,' it would seem that the Court has now jurisdiction in a proper case to order a respondent to pay costs." It seems to me that now that we have the *Judicature Act*, 1890, sect. 5, conferring the largest possible jurisdiction on the Court in the matter of costs, if once a respondent is properly brought here, then, subject to the right of a trustee to have his costs out of the estate, the Court may make an order for payment of the costs by the Respondent just as much under the *Trustee Act*, 1893, as under any other procedure.

I will allow the petition to stand over, the Petitioners being at liberty to present and serve it *de novo*.

March 9. The petition, having been again presented and served, now came on to be heard on the merits, when his Lordship was of opinion that there was no justification for the refusal of the Respondent to transfer.

Methold submitted that the Respondent ought to have his costs. The recognised practice was not to serve the recusant trustee: *In re Third Burnt-Tree Building Society* (3); *Lewin* on Trusts (4). At all events, he ought to be paid his costs of the first of the two petitions.

KEKEWICH J. said that the application as now heard was entirely the result of the Respondent's obstinacy, and he must pay the costs. But as the petition had been presented prema-

(1) *Ellis* on the Trustee Act, 1893, 5th Ed. p. 98.
(2) 34 Ch. D. 24.
(3) 16 Sim. 296.
(4) 9th Ed. p. 1173.

turely, there must be deducted from the costs to be paid by the Respondent those consequent on the petition being presented and served *de novo*, according to the direction given on March 2. His Lordship added that the petition now before him was no doubt technically a different petition from the previous one, although on the same paper.

Solicitors: *Chester, Mayhew, Broome, & Griffithes; J. E. & H. Scott.*

C. C. M. D.

ROMER J.

1894

Dec. 1, 3.

BOLTON *v.* CURRE.

[1894 B. 2148.]

Breach of Trust at Request of Beneficiary—Subsequent Assignee of Beneficiary's Interest—Equity of Trustee to have Beneficiary's Interest Impounded—Married Woman—Restraint on Anticipation—Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *s.* 6—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 45.

The equity of a trustee who commits a breach of trust at the request and for the benefit of a beneficiary is not merely statutory since the passing of the *Trustee Acts*, 1888 and 1893, but is the same now as it was before those Acts, which in fact enlarge the judicial discretion of the Court in such cases.

Consequently, the equities affecting an assignee of the interest of a beneficiary are the same now as they were before those Acts.

A trustee who, at the time a breach of trust is committed, merely declines an offer to take a mortgage of the beneficiary's interest by way of security for the breach of trust, does not *per se* waive or abandon his equity.

It is the duty of a trustee to protect a married woman, restrained from anticipation, against herself when she asks him to commit a breach of trust, and if he knowingly commits a breach of trust at her request the Court will be slow to remove the restraint on anticipation in order that her life interest may be impounded to recoup him.

Ricketts v. *Ricketts* (1) explained.

A married woman, restrained from anticipation, gave her written consent to a change of investment, but at the time was not informed by the trustees and did not know that such change was a breach of trust. The money was advanced to her husband, who to her knowledge was in difficulties, and she shared in the benefit arising from the breach of trust, which was instigated by her husband. The Court, in the exercise of its judicial discretion under sect. 45 of the *Trustee Act*, 1893, refused to remove the restraint on anticipation in order that her life interest might be impounded to recoup the trustees.

THIS was an action to compel the replacement of a sum of £4000 *Great Western Railway* 5 per cent. Rent-charge Stock, sold in breach of trust by the trustees of the marriage settlement of the Defendants Mr. and Mrs. *Blood*, and advanced by the same trustees to the Defendant Mr. *Blood*, and to have any moneys expended in replacing this stock with interest recouped by or out of the property of the beneficiaries, at whose request and for whose benefit the breach of trust was committed.

(1) 64 L. T. (N.S.) 263.

The trustees of the settlement, which was executed on the 25th of July, 1877, were the Defendants *W. E. C. Curre* and *H. R. Peake*, and *G. T. L. Bolton* and *J. Browning*.

The property brought into settlement by Mr. *Blood* was a sum of £5000 carrying interest at the rate of £5 per cent. per annum, and secured by a mortgage of certain estates belonging to him in *Ireland*.

The property brought into settlement by Mrs. *Blood* was (*inter alia*) a legacy of £5000 to which she was entitled under her father's will, and which was satisfied by the transfer to the trustees of a sum of Consols. These Consols were subsequently sold by the trustees and invested in the purchase in their names of the £4000 stock above mentioned.

The trusts of the settlement were, as to the husband's property, for the husband for life, and after his death for the wife for life; and, as to the wife's property, for the wife for life for her separate use without power of anticipation, and after her death for the husband for life or until forfeiture as therein mentioned. And, after the death of the survivor of the husband and wife, both the husband's and the wife's property were directed to be held upon the usual trusts for the issue of the marriage.

The investments authorized by the settlement included the *Great Western* Stock above mentioned, but did not include equitable or second mortgages.

In 1885 Mr. *Blood* was in pecuniary difficulties and requested the trustees to sell the said £4000 stock and advance the proceeds to him upon the security of an equitable mortgage of his said estates in *Ireland*, which were then subject, in addition to the said £5000 mortgage, to several other charges. In compliance with this request, the trustees sold the said £4000 stock and advanced the proceeds, amounting to £5372 17*s.* 6*d.* cash, to Mr. *Blood* on the security of a mortgage dated the 23rd of March, 1885, of his said Irish estates. At this time Mr. *Blood* offered the trustees, by way of additional security for the advance, a mortgage of his life interest in the said sum of £5000 brought into settlement by him; but the offer was not accepted. Mrs. *Blood* gave her written consent to this change of investment, but was not informed at the time by the

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trustees, and did not know, that such change of investment was a breach of trust.

In August, 1893, Mr. *Blood* for valuable consideration by deed assigned to the Defendant *Catherine J. Studdert* his life interest under the said settlement in the said sum of £5000 brought into settlement by him; the Defendant, *Catherine J. Studdert*, when she took her assignment, had notice of the mortgage of the 23rd of March, 1885, and of the fact that the sum of £5372 17*s.* 6*d.* mentioned in that mortgage formed part of the trust funds comprised in the said marriage settlement; and, in answer to inquiries, her solicitors were informed by or on behalf of the trustees that there were no other incumbrances on Mr. *Blood's* life interest except one of £500, which would be paid off.

G. T. L. Bolton survived *J. Browning* (who died insolvent), and died in May, 1893, and the Plaintiff was his legal personal representative. After the death of *G. T. L. Bolton* the Defendant trustees gave the Plaintiff notice that the estate of *G. T. L. Bolton* was liable to make good the breach of trust that had been committed, and thereupon this action was commenced in May, 1894.

Under an order of the Court obtained by the Plaintiff in June, 1894, the Plaintiff and the Defendant trustees paid into Court the sum of £5372 17*s.* 6*d.* in equal shares as representing the proceeds of sale of the £4000 stock above mentioned.

The action now came on for trial, and the Plaintiff claimed a declaration that he was entitled to a lien on the life interest of Mr. *Blood* under the settlement for all moneys expended in replacing the said sum of £4000 stock, and that such lien had priority over any claim by the Defendant *Catherine J. Studdert* as assignee of Mr. *Blood*. He also claimed an order impounding the life interest of Mrs. *Blood*, under the same settlement, by way of indemnity to the trustees against their liability to replace the said £4000 stock.

It was alleged by the Plaintiff, but not admitted by the Defendants (other than the Defendant trustees), that the Irish estates were an insufficient security for the amounts charged thereon.

Neville, Q.C., and *F. L. Wright*, for the Plaintiff:—

The right of the trustees arises under sect. 45 of the *Trustee Act*, 1893, which is substantially the same as sect. 6 of the *Trustee Act*, 1888. Mr. *Blood* instigated the breach of trust. Mrs. *Blood* knew that her husband was in difficulties, and was anxious to help him. They both consented to the change of investment, and executed the mortgage by which it was carried into effect, and have shared the increase of income arising from the change of investment. The trustees are therefore entitled to be recouped out of Mr. and Mrs. *Blood's* life interests under the settlement: *Raby* v. *Ridehalgh* (1); *Doering* v. *Doering* (2); *In re Somerset* (3); *Griffith* v. *Hughes* (4). The case of *Ricketts* v. *Ricketts* (5) may be cited against us; but the decision there, it is submitted, went on the special facts of the case. As to Mr. *Blood's* assignee, she can be in no better position than he.

J. R. Brooke, for the Defendant trustees.

J. F. Bethell, for the infant Defendant, *E. M. Blood*, the only issue of the marriage.

Butcher, for the Defendants Mr. and Mrs. *Blood*:—

As to Mr. *Blood*, his life interest is now vested in the Defendant *Catherine Studdert*, and it is for her to make good her title. As to Mrs. *Blood*, it was the duty of the trustees to protect her, as she was restrained from anticipating. She merely gave her formal consent to a change of investment, not knowing that a breach of trust was contemplated; and the Court, in the exercise of its judicial discretion, will not impound her life interest: *Ricketts* v. *Ricketts*; *Sawyer* v. *Sawyer* (6).

H. Fellows, for the Defendant *C. Studdert*:—

This is the first action since the passing of the *Trustee Act*, 1888, in which trustees claim to impound a life interest against an assignee for value. The *Trustee Act*, 1888, as re-enacted by sect. 45 of the *Trustee Act*, 1893, has superseded the pre-existing

(1) 7 D. M. & G. 104.
(2) 42 Ch. D. 203.
(3) [1894] 1 Ch. 231.
(4) [1892] 3 Ch. 105.
(5) 64 L. T. (N.S.) 263.
(6) 28 Ch. D. 595.

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law as to the right of trustees to be indemnified by beneficiaries. It follows that these rights of trustees are not equitable as before, but merely statutory, and do not attach until an order of the Court has been made impounding the beneficial interest. Therefore, as Mrs. *Studdert* took her assignment before any proceedings to impound Mr. *Blood's* life interest, she is now absolutely entitled as against any claim by the trustees: *In re Somerset* (1); *In re Knapman* (2); *Priddy* v. *Rose* (3); *Woodyatt* v. *Gresley* (4). Further, Mrs. *Studdert* is not a beneficiary within the meaning of sect. 45 of the *Trustee Act*, 1893; but, even if she is, the Court, in the exercise of its judicial discretion, will not impound this life interest, for the correspondence shews that her solicitors were not fully informed at the time of all the circumstances. Lastly, the trustees advanced the trust money to Mr. *Blood*, and deliberately took from him an independent and substantial security outside the settlement altogether, and declined at the time the additional security of Mr. *Blood's* life interest which he then offered to them. They must, therefore, be taken to have abandoned or waived their equity against Mr. *Blood*, and cannot now assert it against his assignee for value.

Neville, in reply.

ROMER J.:—

I will first deal with the claim against the life interest of the Defendant Mr. *Blood*, now assigned to Mrs. *Studdert*. Mr. *Blood* instigated the breach of trust in question, and he received the money advanced in pursuance of it, and became a debtor to the estate in respect of that money. The trustees' right to have his life interest impounded under the circumstances would be clear if he had still retained that interest. It is also, I think, clear—indeed, this has not been challenged—that, as the law stood prior to the passing of the *Trustee Act* of 1888, the equity of the trustees, and of the other beneficiaries, against Mr. *Blood's* life interest would affect that interest in the hands of Mrs. *Studdert*, as she purchased it subsequently to the breach of trust and the

(1) [1894] 1 Ch. 231.
(2) 18 Ch. D. 300.
(3) 3 Mer. 86.
(4) 8 Sim. 180.

borrowing of the money. I am saying this apart from a special contention made on the part of Mrs. *Studdert*, which I will mention in a moment. But it is now said on her behalf that sect. 6 of the *Trustee Act*, 1888, which was substantially repeated by sect. 45 of the *Trustee Act*, 1893, has altered the law. It is contended that the whole of the law as to the impounding of interests to indemnify trustees is now contained in those sections, and that the formerly existing law on the subject was put an end to by the Act of 1888, unless it was re-enacted by sect. 6. It is further said that by that section, and the corresponding section of the Act of 1893, the impounding is now put absolutely in the discretion of the Court, and that the interest of a beneficiary is not affected by any equity in favour of the trustees until the Court orders the impounding; and that, therefore, Mrs. *Studdert* is entitled to hold her purchased interest free from any claim of the trustees, as she bought the interest before any order of the Court was obtained. I think this contention cannot be sustained. In my opinion sect. 6 of the Act of 1888 was intended to enlarge the power of the Court as to indemnifying trustees, and to give greater relief to trustees, and was not intended and did not operate to curtail the previously existing rights and remedies of trustees, or to alter the law except by giving greater power to the Court. The discretion given to the Court by sect. 6, as to whether it will impound or not, is a judicial discretion; and if, prior to the passing of that Act, the Court would, in a proper case, enforce the equity of the trustee, and impound the interest of a beneficiary in the hands of an assignee, then the Court would be bound to do the same in a similar case after the Act. The equity of the trustee existed as much since the Act as before; and if the Court before the Act thought fit, in a proper case, to enforce that equity by impounding, it will equally since the Act think fit to enforce the equity in a similar case, and impound. This deals with the main contention raised on Mrs. *Studdert's* behalf. But then, as a special defence, it was also said for her that in some way the equity against Mr. *Blood's* interest that I have mentioned was waived or lost because the trustees did not take, as an additional security for the loan to them, an express charge on his life

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interest, as offered originally on Mr. *Blood's* behalf. I do not follow that. I do not think that the non-taking of an express charge amounted, or could be treated as amounting, to an abandonment of the right to enforce the equity. Why the express charge was not given was probably because it was not thought right that the life interest should be at once hampered, and payments to Mr. *Blood* stopped, as might have happened if an express charge had been given; and because I think that, at the date of advance, it was not understood, though it ought to have been understood, by the parties to the transaction that a breach of trust was being committed, and I hold that there was no intention of abandoning and no abandonment of the equity I am referring to. Nor do I see that the Plaintiff or the other trustees have lost their rights because of any answers to the applications by Mrs. *Studdert's* solicitors when she was contemplating her purchase. No untrue statement or unfair conduct on the part of the trustees is proved, and I do not think that the trustees are estopped by that correspondence from now raising their present claim. The trustees would clearly have had a right, notwithstanding that correspondence, to take advantage of an action by the beneficiaries other than Mr. *Blood,* to impound his life interest to make good his debt; and I do not think that the trustees have lost their right, because, instead of waiting for such action, they have first replaced the money which it turns out ought not to have been advanced. Besides, Mrs. *Studdert* is in this position: when she bought the life interest she knew of the mortgage which had been made by Mr. *Blood,* and that he was a debtor in respect of the money borrowed, and she took subject to the equities which arose under those circumstances—although I have no doubt that, as a matter of fact, it did not occur, either to her or her advisers, to consider that any equity would, or was likely to, arise. For these reasons I hold that the trustees' right to have the interest of Mr. *Blood* impounded is established, and that the life interest must be impounded accordingly.

I have next to consider the life interest of Mrs. *Blood,* which she is restrained from anticipating. Now, that lady has done nothing in the matter of the breach of trust but consent in writing to the change of investment. She did not instigate the change; she did not in fact know that the new investment was a

breach of trust, and the trustees had no direct communication with her on the subject, and, certainly, they did not explain to her that the proposed new investment was a breach of trust, or was improper in any way. Under these circumstances, in the exercise of my judicial discretion, I shall not order the removal of the restraint on anticipation in order that the trustees may impound her life interest. I desire to say a word about my decision in the case of *Ricketts* v. *Ricketts* (1), which appears to have been misunderstood. I did not intend to lay down, and I did not in fact lay down in that case, any general rule that a trustee who knowingly committed a breach of trust could never have his beneficiary's interest impounded. What I considered in that case was that one of the facts to be borne in mind by the Court, when asked to exercise its discretion, is whether the breach of trust was committed by the trustee knowingly; and in that case, seeing that the trustee acted knowingly, and having regard to the other circumstances of the case, I refused to remove the restraint on anticipation of the married woman's interest in order to give a security to the trustee. I adhere to what I said then; and in my judgment it is the duty of a trustee to protect a married woman against herself when she, as a beneficiary restrained from anticipation, asks him to commit a breach of trust. And I do not think a trustee ought to be allowed to deliberately commit a breach of trust at the request or with the consent of such a beneficiary in the hope and expectation that the Court will afterwards assist him by removing the restraint on anticipation and give him a security for the breach of trust which at the time he had no right to look to. The restraint on anticipation would be practically rendered inoperative if a trustee could be certain that when he disregarded it and committed a breach of trust he would be put by the Court in the same position as if the restraint had never existed. For these reasons I dismiss the claim of the trustees to impound Mrs. *Blood's* life interest.

Solicitors for Plaintiff: *Patersons, Snow & Co.*, agents for *Wilson, Wright & Wilsons, Preston.*

Solicitors for the several Defendants: *Booty & Bayliffe; Lattey & Hart; H. Wharton.*

(1) 64 L. T. (N.S.) 263.

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Jan. 11, 15, 17; *Feb.* 11.

ECCLESIASTICAL COMMISSIONERS *v.* WODEHOUSE.

[1894 E. 189.]

Ecclesiastical Law—Lease of Mines in Glebe Lands—Ecclesiastical Commissioners—Right to Injunction against Illegal Mining—13 *Eliz. c.* 10; 13 *Eliz. c.* 20; 14 *Eliz. c.* 11; 14 *Eliz. c.* 14; 5 *& 6 Vict. c.* 108, *ss.* 6, 20; 21 *& 22 Vict. c.* 57, *ss.* 1, 2, 10.

After the passing of the restraining statutes of *Elizabeth*, the opening of mines in glebe lands, and the letting of the mines by the incumbent, even with the consent of the patron and ordinary, were illegal until the passing of 5 & 6 Vict. c. 108, which enabled the mines to be leased with the consent of the Ecclesiastical Commissioners.

The head-note of *Duke of Marlborough* v. *St. John* (1) corrected.

An incumbent cannot lawfully continue, or authorize a tenant, to work mines in glebe land which have been unlawfully opened.

Huntley v. *Russell* (2) and *Bartlett* v. *Phillips* (3) followed on this point.

The Ecclesiastical Commissioners can maintain an action to restrain the working of mines in glebe lands otherwise than under a lease sanctioned by them.

Mines in glebe land were illegally opened by the rector in 1850. In 1885 his successor agreed, subject to the consent of the Ecclesiastical Commissioners being obtained, to lease the mines at certain royalties, which for some years were received by him and paid to the Commissioners, who repeatedly pointed out that the working was informal, and that a lease with their consent ought to be applied for. Early in 1894 the tenant applied for a lease, which was refused *bonâ fide* and for adequate reasons:—

Held, that the Commissioners were entitled to an injunction to prevent the further working of the mines.

Holden v. *Weekes* (4) explained.

THIS action was brought by the Ecclesiastical Commissioners for *England* against the Rev. *F. A. Wodehouse*, rector of *Gotham* in the county of *Nottingham*, and *John Salkeld*, for a declaration that an agreement between the Defendants, dated the 20th of May, 1885, for a lease by the rector to *Salkeld* of minerals under part of the glebe lands of the rectory of *Gotham*, might be declared void, and for an injunction to restrain *Salkeld* from continuing to work the minerals.

(1) 5 De G. & Sm. 174.
(2) 13 Q. B. 572.
(3) 4 De G. & J. 414.
(4) 1 J. & H. 278.

The mine was first opened about 1850 by a former rector of *Gotham*; but the opening and subsequent working of the mine by him were done without the consent of the Plaintiffs, and were, according to the judgment of Mr. Justice *Romer*, illegal.

Clause 1 of the agreement of the 20th of May, 1885, provided as follows: "Subject to the necessary consents for the purpose being obtained (and which consents the lessor shall use his best endeavours to obtain) the lessor shall let, and the lessee shall take, the mineral called gypsum, together with the clay or marl, upon or under such of the glebe lands belonging to the rectory of *Gotham* aforesaid as lie" within certain boundaries, for a term of twenty-one years from the 25th of March, 1885, determinable as thereinafter mentioned, at a yearly dead rent of £100 and subject to certain royalties.

Clause 3 provided that, on the necessary consents for the purpose being obtained, the lessor should execute a proper lease containing the provisions in the agreement referred to.

Clause 9 was as follows: "The lessor will apply for the necessary consents and proceed with the preparation of the said lease as soon as conveniently may be after receiving a written request from the lessee so to do; but, until such request shall be received, it shall be optional with, and not imperative on, the lessor to take any such steps, and until the execution of the said lease the said premises shall be held by the lessee under this agreement, at the rents aforesaid and subject to the covenants and conditions hereinbefore agreed to be contained in the said lease, without any interruption or prevention by the lessor, and so far as the rules of law will permit; but if the necessary consents shall be refused, or from any other cause except the wilful act or default of the lessor, the lease shall not be granted, and, whether the lessee shall continue to hold the premises under this agreement or shall have quitted the same, the lessor shall not be liable to the lessee for any loss or damage he may have sustained, and the lessee shall not be entitled to any compensation or recompense whatever."

No consent of the patrons or the ordinary was ever obtained to the letting or working of the mine.

Salkeld, who for some years before the agreement had been

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working the mine, continued to work it until restrained by the interlocutory injunction referred to below, paying royalties from time to time to *Wodehouse*, who handed them to the Plaintiffs. No leave or consent to the working was ever obtained from the Plaintiffs, and *Salkeld*, being pecuniarily embarrassed, for some years after the date of the agreement refrained from asking *Wodehouse* to apply for the Plaintiffs' consent.

The first payment by *Wodehouse* to the Plaintiffs was made in December, 1887, and in a letter to him written on the 19th of that month they pointed out that the working was of an informal character, and suggested that an agreement should be entered into on terms recommended by their surveyor. In subsequent letters to *Wodehouse*, some of which were written in April, 1891, and August 1892, they called his attention to the necessity of a formal application for a lease being made.

Salkeld, having at last been informed that the irregular position of matters could not be any longer allowed to continue, in August, 1893, requested *Wodehouse* to apply to the Plaintiffs for their sanction to a lease, and *Wodehouse* made the application on the 8th of December, 1893.

The Plaintiffs, after considering the application and making inquiries, refused to sanction any lease or letting to *Salkeld*, their reason for refusing being that they were not satisfied as to his pecuniary position.

The refusal was notified to *Salkeld*; but he continued to work the mine, and on the 9th of February, 1894, the action was commenced.

On the 2nd of March, 1894, Mr. Justice *Kekewich*, to whose Court the action was then attached, ordered that *Salkeld* should be restrained, until judgment or further order, from further working the mine.

Salkeld, by his defence, alleged

(*a.*) That the Defendants were estopped and precluded from denying that they had assented to a lease on the terms mentioned in the agreement.

(*b.*) That when the Act 5 & 6 Vict. c. 108 was passed, the mine was an open one, and that the right of the rector to demise the same was not affected by the Act.

(*c.*) That the mine was, when *Wodehouse* became rector, and had from time immemorial been, and was at the date of the agreement, lawfully open and publicly worked, the working having taken place with the acquiescence of the patrons or ordinary and the Plaintiffs.

(*d.*) That the Plaintiffs' consent was not necessary to a lease, and that the workings complained of were not mines within the Acts 5 & 6 Vict. c. 108 and 21 & 22 Vict. c. 57.

(*e.*) That the Plaintiffs' consent, if necessary, must be presumed to have been given.

(*f.*) Alternatively, that *Wodehouse*, in breach of the agreement, neglected and refused to use his best endeavours to obtain the Plaintiffs' consent.

Salkeld counter-claimed for

(1.) Specific performance of the agreement.

(2.) Alternatively, a declaration that there was a valid agreement for a lease during the life or incumbency of *Wodehouse*.

(3.) Alternatively, a declaration that *Salkeld* was entitled to hold and work the mine as tenant from year to year, subject to payment of the rent and royalties.

Salkeld also claimed (in case the Plaintiffs were entitled to maintain the action)—(4.) Repayment of the rents and royalties. (5.) Alternatively, damages against *Wodehouse* for breach of contract.

The action was transferred for trial before Mr. Justice *Romer*, and was tried before him on the 11th, 15th, and 17th of January, 1895.

Neville, Q.C., and *O. L. Clare*, for the Plaintiffs:—

The Defendant *Salkeld's* defence that the Plaintiffs are estopped from saying they never consented to a lease cannot be sustained, for the Plaintiffs could not waive their right to insist on statutory requirements being complied with.

Nor can it be contended that the mine may be worked without the Plaintiffs' consent. The statutes 13 Eliz. c. 10, 13 Eliz. c. 20, 14 Eliz. c. 11, and 14 Eliz. c. 14, prohibit alienations of the glebe by the rector except in the cases mentioned in the statutes, of which this case is not one.

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Between the passing of 13 Eliz. c. 10, and the passing of 5 & 6 Vict. c. 108, under which last-named Act the Ecclesiastical Commissioners were appointed, such an alienation as the one now complained of would have been void; therefore, no working could be justified on the ground that the mine was an open one, unless the opening was prior to the 13 Eliz. c. 10.

Salkeld cannot, in the face of the agreement entered into by him, say that, if the agreement is bad, he can work under a letting made to him under the rector's common law right.

Even if the consent of the Commissioners is not required, an incumbent cannot open mines without the consent of the patron and the ordinary, or, it is submitted, even with their consent: *Holden* v. *Weekes* (1). The opening of mines is waste, and waste is an alienation *ad hoc* prohibited by the statutes of *Elizabeth*: *Dean of Worcester's Case* (2). As regards waste, a parson stands is no better a position than an ordinary tenant for life: *Duke of Marlborough* v. *St. John* (3); *Sowerby* v. *Fryer* (4).

[ROMER J.:—What is the authority for the statement in the head-note of *Duke of Marlborough* v. *St. John*, that "the parson, with the consent of the patron and ordinary, may cut timber and open mines"? The statement in the judgment, at page 179 of the report, does not support it.]

The note must mean that he might do these things, with their consent, before the passing of the restraining statutes: see *Holden* v. *Weekes*. If the original opening by a preceding rector was unlawful, the rector in possession is not justified in continuing the wrong: *Bartlett* v. *Phillips* (5); *Ross* v. *Adcock* (6).

[ROMER J.:—I suppose you do not contend that if the mine was rightfully opened, the statute 5 & 6 Vict. c. 108 made it unlawful to continue the working.]

After the passing of 13 Eliz. c. 10 a mine could not be lawfully opened on an existing ecclesiastical property. After that date there might have been a fresh endowment with land on which open mines existed; but that is not the case which the

(1) 1 J. & H. 278.
(2) 6 Rep. 37 a.
(3) 5 De G. & Sm. 174.
(4) Law Rep. 8 Eq. 417.
(5) 4 De G. & J. 414, 421.
(6) Law Rep. 3 C. P. 655, 665.

Defendants set up. As regards the consent of the Plaintiffs being required, an ecclesiastical corporation sole may, with the consents required by the statute, lease mines for a term not exceeding sixty years to take effect in possession, at such rent and royalty and subject to such provisions as shall be approved by the Ecclesiastical Commissioners: 5 & 6 Vict. c. 108, s. 6. The consents required are those of the Ecclesiastical Commissioners, and, in the case of a lease by an incumbent, of the patron: *Ibid.* s. 20. The consents must be testified by the consenting party being made a party to and executing the deed: *Ibid.* s. 21; and the counterpart must be deposited with the Commissioners: *Ibid.* s. 29.

A later statute enabled leases to be granted in consideration, wholly or partly, of a premium: 21 & 22 Vict. c. 57, s. 1. And the consideration, whether premium, rent, or royalty, was directed to be paid to the Commissioners: *Ibid.* s. 2. Sect. 10 of the same Act repeals sect. 14 of 5 & 6 Vict. c. 108, which provided that a portion of the improved value, in case of a lease of mines, should be paid to the Commissioners, and the remainder otherwise applied.

The Plaintiffs can maintain an action for an injunction to prevent illegal working. They are entitled to the fruits of lawful working, and have a duty, as statutory trustees, to see that no other working takes place. The patron may also be in a position to ask that waste may be prevented: *Knight* v. *Mosely* (1); but this does not prevent the Plaintiffs from suing; they are the proper persons, and are bound, to sue.

Birrell, Q.C., and *E. A. Speed*, for the Defendant *Wodehouse*:—

All that *Wodehouse* did was on the assumption that the Commissioners would be parties to it. He has accounted for all moneys received by him. Having regard to clause 9 of the agreement, *Salkeld* has no claim against him.

Oswald, Q.C., and *P. Barlow*, for the Defendant *Salkeld*:—

The Plaintiffs are debarred by laches and acquiescence from now complaining of this working. They have known of the

(1) Amb. 176.

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working for years without attempting to stop it, and have accepted the royalties paid under the agreement. And where acquiescence by a corporation to a letting is shewn, specific performance of the contract will be ordered, though it has not been executed with due formalities: *Crook* v. *Corporation of Seaford* (1); *Howard* v. *Patent Ivory Manufacturing Company* (2); *Ramsden* v. *Dyson* (3); *Plimmer* v. *Mayor of Wellington* (4). The consent of the Commissioners was, however, unnecessary. At the date of the agreement *Wodehouse* had at common law the right, with the consent of the patron and ordinary, to open mines or to lease them for his life, or, at any rate, the time during which he remained the rector: *Duke of Marlborough* v. *St. John* (5); *Jenkins* v. *Green* (No. 3) (6); *Blackstone's* Commentaries (7). And sect. 8 of 5 & 6 Vict. c. 108 expressly preserves existing rights of leasing.

The mine was, moreover, opened and publicly worked before *Salkeld* commenced to work it, and the rector, as tenant for life, could work such a mine himself or by his tenant: *Duke of Marlborough* v. *St. John*; *Clavering* v. *Clavering* (8). In *Bartlett* v. *Phillips* (9) the working was secret. After this length of time the Court will presume that the mine was lawfully opened. Where a mine has been opened, breaking fresh ground is not opening a new mine: *Elias* v. *Snowdon Slate Quarries Company* (10). The digging of mines in glebe lands is not waste: *Burn's* Ecclesiastical Law (11); *Countess of Rutland's Case* (12).

If no greater interest was obtained by *Salkeld*, the agreement, coupled with the receipt of rent, constitutes a tenancy from year to year which has not been determined: *Doe* v. *Collinge* (13).

The Commissioners cannot maintain this action. They are not the patrons or the ordinary; the fee simple is not vested in them; and until a lease has been made they have no right to royalties. They are really bringing an action of ejectment without having

(1) Law Rep. 6 Ch. 551.
(2) 38 Ch. D. 156.
(3) Law Rep. 1 H. L. 129.
(4) 9 App. Cas. 699.
(5) 5 De G. & Sm. 174, 179.
(6) 28 Beav. 87.
(7) Bk. 2, pp. 320, 321.
(8) 2 P. Wms. 388.
(9) 4 De G. & J. 414.
(10) 4 App. Cas. 454.
(11) 9th Ed., vol. ii., p. 302.
(12) 1 Lev. 107; and *sub nom.* *Seigneur de Rutland* v. *Gie*, 1 Sid. 152.
(13) 7 C. B. 939.

themselves any title to the land. The proper person to bring an action to restrain waste is the patron: *Huntley* v. *Russell* (1); *Holden* v. *Weekes* (2).

Neville, in reply:—

This is not a case of continuing to work old mines. If there was an old mine, that was worked out and a new one was opened.

The acts alleged against the Plaintiffs do not amount to acquiescence disabling them from suing: *Willmott* v. *Barber* (3). It is not possible to presume facts which would make the working legal, for the origin of the working is actually known.

1895. Feb. 11. ROMER J.:—

The first contention of the Defendant *Salkeld* is that the Plaintiffs must be taken to have consented, or be held to be in the same position as if they had consented, to the leasing or letting of the gypsum mine to him by the Defendant *Wodehouse* under the agreement between the Defendants dated the 20th of May, 1885. And *Salkeld* chiefly bases this contention on the fact that he has been working the gypsum for several years and has paid royalties to the Defendant *Wodehouse*, who has passed them on to the Plaintiffs, who have retained them. But, apart from the point that under the statutes dealing with the consent of the Plaintiffs to such a leasing their consent has to be given in a certain form, and that no consent has been given in fact, either in that form or at all, it is clear to me that when the circumstances are looked into, the contention of *Salkeld* that he has some right against the Plaintiffs cannot be sustained. When the agreement was entered into between the Defendants they were both aware that the consent of the Plaintiffs was essential to its validity, and that any working by *Salkeld* before such consent was given would be at his risk, and impeachable if the consent was not afterwards obtained. And the agreement was made expressly subject to the necessary consents being obtained, and these consents were to be applied for by *Wodehouse*,

(1) 13 Q. B. 572. (2) 1 J. & H. 278.
(3) 15 Ch. D. 96, 105.

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when requested, in writing, to do so by *Salkeld*. And throughout his working *Salkeld* was well aware that the consent of the Plaintiffs had not been obtained. What happened was this. After the agreement was entered into *Salkeld*, being financially embarrassed, did not for several years want to have the consent applied for, and he accordingly refrained from requesting *Wodehouse* to apply for the consent of the Plaintiffs. In fact, it suited the purposes of *Salkeld* to continue working in the unauthorized way he did. Meantime he paid royalty to *Wodehouse*, who forwarded it to the Plaintiffs. But on the first payment being made to the Plaintiffs by *Wodehouse*, which was in December, 1887, they pointed out to him, by a letter of the 19th of December, 1887, that the working was of an informal character, and suggested an agreement being entered into on terms recommended by their surveyor, Mr. *Sellars*. And in effect what happened was, that the Plaintiffs did not at the time interfere to stop the working or return the royalty because they assumed that in due course a formal application would be made to them to consent to a lease to *Salkeld*, and they no doubt hoped that, if an investigation afterwards proved satisfactory and a lease was duly sanctioned and executed, the irregular *interim* working might be validated or overlooked, and no difficulty arise in respect of it. And on this footing the first and subsequent payments on account of royalty were retained by the Plaintiffs. But the Defendant *Salkeld*, as I have before said, delayed having the lease formally applied for, and the Plaintiffs (who no doubt have very numerous matters to attend to) for some time took no active steps to insist on this sanction being applied for or the irregular working being discontinued, though they did meantime again call the attention of *Wodehouse* to the necessity of a formal application for a lease being made (see, for instance, the letters of the 2nd of April, 1891, and the 6th of August, 1892). But this quiescence on the part of the Plaintiffs ought not to have misled, and I believe did not mislead, *Salkeld* in any way, for, as I have pointed out, he all along knew that the Plaintiffs' consent was essential and must be obtained, and that in fact it had not been obtained, and that meantime his working was irregular. At last the Defendant

Salkeld was informed that the irregular position of matters I have indicated could no longer continue, and accordingly in August, 1893, *Salkeld* requested *Wodehouse* to make the proper application to the Plaintiffs for their sanction to a lease, and on the 8th of December, 1893, such application was duly made. The Plaintiffs considered the application, and after making inquiries they, in good faith and in discharge of their duty, came to the conclusion that owing to the pecuniary position of *Salkeld* the proposed lease to him ought not to be sanctioned, and they accordingly refused to consent to any lease or letting to him. This was notified to *Salkeld*, but nevertheless he insisted on continuing his working; and thereupon the Plaintiffs were obliged to commence this action, and they applied for and obtained from Mr. Justice *Kekewich* an *interim* injunction, until trial, restraining *Salkeld* from further working the gypsum. Under these circumstances, it appears to me that the Plaintiffs cannot be held to have consented to the agreement between *Salkeld* and *Wodehouse*, and that *Salkeld* has no equity of any kind against the Plaintiffs which would prevent them insisting upon the injunction. No doubt, some difficulty might arise if either side wished to attack the *interim* arrangement under which the irregular working had gone on up to the date of the Plaintiffs' refusal to consent to a lease to *Salkeld*, and for which working royalty had been paid by *Salkeld* and received by the Plaintiffs. But the Plaintiffs are not seeking now to attack that arrangement or to undo what has been done. All that they ask before me is for a continuance of the injunction granted by Mr. Justice *Kekewich*. And, so far as the Defendant *Salkeld* is concerned, it was to his advantage not to attack the arrangement, seeing that if he did so, he could only recover the royalty paid by him on the footing of accounting for the gypsum he obtained, and which was far more valuable. The working in fact was profitable, and his counsel admitted that it was not to his client's interest, and that accordingly he did not seek, to undo what passed prior to the commencement of this action.

The next point raised by the Defendant *Salkeld* is this—he contends that the Defendant *Wodehouse* had the right to work the gypsum, even without the consent of the Plaintiffs, and

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could therefore lease that right, at any rate during his life, and that he (*Salkeld*), through this right of *Wodehouse*, and as against both *Wodehouse* and the Plaintiffs, is entitled to continue working the gypsum for the term fixed by the agreement of the 20th of May, 1885, if *Wodehouse* so long lives, or, failing that, as a yearly tenant of *Wodehouse* so long as his yearly tenancy is not properly determined by *Wodehouse*. There is obviously a difficulty in the way of this contention, seeing that *Wodehouse* never agreed to let to *Salkeld* except subject to the Plaintiffs' consent being obtained; but I pass this over, as I intend to decide the main question raised—namely, whether *Wodehouse* had, in fact, a right to work the mine without the Plaintiffs' consent. Now it is clear that by the statutes 13 Eliz. c. 10, 13 Eliz. c. 20, 14 Eliz. c. 11, and 14 Eliz. c. 14, all alienations of the glebe by a rector, beyond those expressly authorized, are prohibited. And waste is an alienation, and therefore prohibited. This was pointed out at an early date in the *Dean of Worcester's Case* (1). And since the statutes in question it has been repeatedly held that, as an incumbent has only the powers of a tenant for life, the opening of new mines on a glebe by him, at any rate without the consent of both patron and ordinary, is waste and illegal (see, amongst other cases, *Knight* v. *Mosely* (2) and *Huntley* v. *Russell* (3)). And, seeing that the statutes absolutely prohibited alienation beyond those thereby expressly authorized, that waste is an alienation prohibited, and that the opening of a new mine is waste, it appears to me that, even with the consent of the patron and ordinary, the parson cannot open new mines; and certainly there is no case which decides the contrary. There is nothing in *Holden* v. *Weekes* (4) which militates against the view I take. And I may remark that the head-note to *Duke of Marlborough* v. *St. John* (5), stating that the parson, with the consent of the patron and ordinary, may open mines, is not really justified by what was said in the judgment of Vice-Chancellor *Parker*, as the passage relied upon in support of the head-note (6) dealt with the parson's right at

(1) 6 Rep. 37 a.
(2) Amb. 176.
(3) 13 Q. B. 572.
(4) 1 J. & H. 278.
(5) 5 De G. & Sm. 174.
(6) Ibid. 179.

common law—that is to say, as it existed prior to the statutes of *Elizabeth*. This was pointed out by Vice-Chancellor *Wood* in *Holden* v. *Weekes* (1), where he also points out that the *Countess of Rutland's Case* (2) is no authority for the proposition that since the statutes a parson might open a new mine. And, moreover, there appears to me considerable force in the argument of the plaintiff's counsel in *Holden* v. *Weekes* (3), that, even in the cases of the leases authorized by the restraining statutes, the leases must be by deed at the ordinary rents, and that there could be no ordinary rents of mines which had never before been opened. No doubt, it was an inconvenience that, owing to the statutes, new mines could not be opened at all. And probably it was for this very reason that the Legislature, by the statutes 5 & 6 Vict. c. 108, and 21 & 22 Vict. c. 57, gave power to open mines under the sanction of the Ecclesiastical Commissioners. For these reasons it appears to me that, even with the consent of the patrons and ordinary, the Defendant *Wodehouse* had no right to open a new mine, and could therefore confer no right whatever on the Defendant *Salkeld* to work such mine. But in the present case, not only has no consent of the ordinary been given, but on the evidence before me I am not satisfied that even the consent of the patrons has been given.

The next point raised by the Defendant *Salkeld* is that the mine of gypsum worked by him is to be treated, not as a new mine, but as one already opened, because it had been worked by the rector who immediately preceded the Defendant *Wodehouse*. But on the facts before me it is established that the mine had never been opened and worked at all before it was opened, about the year 1850, by the late rector. That opening and the subsequent working by the late rector were done without the consent of the Plaintiffs, the Ecclesiastical Commissioners, and were illegal. This being so, that illegal working could not give the present rector a right to continue it, or to treat the mine as an open one, when he was appointed, which he had the right to work. Of course, a mine might have been worked for so long a time and under such circumstances as to justify the Court in

(1) 1 J. & H. 284. (2) 1 Lev. 107; 1 Sid. 152.
(3) 1 J. & H. 281.

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holding that it was an open mine when the statutes of *Elizabeth* were passed, or at any rate that the continued working must be presumed to be lawful, but that is not the case here. And, in justice to the present rector, it must be pointed out that he did not pretend to have any right to work this mine except with the consent of the Plaintiffs, to be given in accordance with the provisions of the above-mentioned statutes of the present reign. With reference to the point that the working of the past rector would not in itself entitle the present rector to contend that the mine is an open one so far as he is concerned: see the observations in the judgment of the Court in *Huntley* v. *Russell* (1) and the judgment of Lord Justice *Turner* in *Bartlett* v. *Phillips* (2), where he observes with regard to the defendant, the vicar, in that case, "If a wrong act was done by a preceding vicar I do not see how the defendant could be justified in continuing the wrong." This point of the Defendant *Salkeld*, therefore, also fails.

The working of the Defendant *Salkeld* being illegal, the only remaining question, so far as the Plaintiffs' action is concerned, is whether the Plaintiffs are entitled to sue to restrain the further illegal working. In my opinion, they are. Under the statutes 5 & 6 Vict. c. 108, and 21 & 22 Vict. c. 57, no lease of this mine can be made without their consent, and if their consent be given, all the rent under the lease must be paid to them. They have, therefore, a clear interest in the mine, and in seeing that the rent payable to them under any future lease sanctioned by them is not diminished or prejudiced by previous illegal workings. And, indeed, in the present case, the necessity of their being able to sue is apparent from the fact that the Defendant *Salkeld* is contending that they must be held to have given their consent to his working. It is said that the Plaintiffs cannot sue because they have no estate in the glebe. But the Courts have never held that an estate in the glebe is necessary to enable a person interested to sue to restrain waste in the glebe. The patron has no estate in the glebe (see *Co. Litt.* (3)), and yet he certainly can sue. So, in proper cases, can the ordi-

(1) 13 Q. B. 572, 591. (2) 4 De G. & J. 421.
(3) 341 a.

nary, though he has no estate, and apparently even the metropolitan and the Crown (see the judgment in *Ross* v. *Adcock* (1), and the cases there referred to). In fact, owing to the nature of ecclesiastical estates and the difficulty of preventing waste and of finding persons sufficiently interested to intervene, the Courts have been (and I think quite rightly) anxious to allow any person who has an interest (even though small) to come forward and move the Court for the purpose of preventing waste. The Plaintiffs, under their statutes, have conferred upon them important rights and duties with regard to the leases of mines on parsons' estates, and have such an interest in these mines as entitles them, in my opinion, to apply to the Court for an injunction in any case where those mines are being illegally worked. And still more have they a right to come in a case like the present, where, if they did not intervene, the illegal working would practically go on unchecked. No one but the Plaintiffs has offered to intervene in the present case, and probably under the circumstances no one but the Plaintiffs had sufficient grounds for intervention, especially as the Defendant *Salkeld* contended that he was in the position of a man working with the consent of the Plaintiffs. Before quitting this part of the case, I ought to say that a statement is attributed to Vice-Chancellor *Wood* in the report of *Holden* v. *Weekes* (2), that the patron is the only person who can properly interfere with reference to the opening of mines by an incumbent. I think that learned Judge could not have meant literally what he is there reported to have said. He was dealing with a case where the patron was suing, and I think he only desired to point out that there was really no question as to the patron's right to sue. In fact, he refers immediately afterwards to the ordinary's right to intervene.

I therefore hold that the Plaintiffs are entitled to succeed, and I make perpetual the injunction restraining the Defendant *Salkeld* from continuing to work the mine, and I order him to pay the Plaintiffs' costs of their action. I make no order as to the costs of the Defendant *Wodehouse* in the Plaintiffs' action. Then, as to the counter-claim of *Salkeld*, it must be dismissed

(1) Law Rep. 3 C. P. 667. (2) 1 J. & H. 285.

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with costs, both as against the Plaintiffs and as against the Defendant *Wodehouse*. The claim of *Salkeld* that he has a right to continue his working clearly fails. He has not been deceived or misled in any way, and his claim for damages for deceit is unfounded. His counter-claim for repayment of rent and royalties paid by him for his working until the injunction was abandoned by him for the reasons above pointed out by me. And his claim against *Wodehouse* for damages for breach of contract wholly failed. The only breach of contract he could allege was that *Wodehouse* had not forwarded to the Plaintiffs with sufficient speed the application for a lease after he had, in writing, requested *Wodehouse* to do so. But even if *Wodehouse* was not justified, under the circumstances, in making the delay he did in forwarding the application, and I do not say he was not justified, clearly no damage accrued to the Defendant *Salkeld* by the delay. I gather that the delay benefited him, as thereby he was enabled to work the mines longer than he otherwise could, and so probably made a profit. At any rate, no damage caused by the delay was proved before me.

Solicitors for Plaintiffs: *Milles, Jennings-White & Co.*

Solicitors for Defendant *Wodehouse*: *Harvey & Speed*, agents for *W. H. Speed, Nottingham.*

Solicitors for Defendant *Salkeld*: *Fox & Joy.*

F. E.

COOPER *v.* STEPHENS.

ROMER J.

1895

Feb. 24, 25; *March* 7.

[1894 C. 1135.]

Copyright—Sale of Blocks for Personal Use—Unassignable Licence—Effect of Verbal Licence—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *s.* 15—*Injunction—Substantial Injury.*

The Plaintiffs were the registered owners of the copyright in books containing illustrations, drawn by themselves, of carriages; and their principal business was to supply copies of the drawings to persons in the carriage trade for advertising purposes, the copies being generally printed by themselves and supplied to the customers on advertising sheets.

Occasionally the Plaintiffs, for a money consideration, supplied electro blocks of the drawings in order that customers might themselves print the designs with other matter not printed by the Plaintiffs; and for this purpose they sold electro blocks to *L.* There was not any written agreement with or licence to *L.* with reference to the use of the blocks.

The Defendants, with the permission of *L.*, used his blocks for printing drawings which they published:—

Held, that the Plaintiffs were entitled to an injunction to restrain the Defendants from using the blocks.

Semble, that the Court would not have granted an injunction to restrain *L.* from personally using the blocks, although he had no written licence to do so under sect. 15 of the *Copyright Act*, 1842.

THIS action was brought by *James Charles Cooper* and *Charles Abraham Cooper* (trading as *J. & C. Cooper*) to restrain *Stephens & Mackintosh* and *George Gibbons & Co.* from printing, publishing, reproducing, selling, exhibiting, or distributing any print or illustration taken, copied, or colourably altered or imitated from any print, drawing, or illustration contained in the Plaintiffs' copyright catalogues, or books of designs, entitled respectively—(1.) "Book of Carriage Drawings, designed by *J. & C. Cooper*, 64, *Long Acre, London, W.C.*"; (2.) "No. 16. Book of Light Vans and Business Traps on two and four Wheels, designed by *J. & C. Cooper*, 64, *Long Acre, W.C.*"; and (3.) "Catalogue of Carriage Designs for *Alexander Mackenzie.*" The Plaintiffs also claimed damages and incidental relief.

They complained that *Gibbons & Co.*, who were printers in *Leicester*, and *Stephens & Mackintosh*, who were advertising contractors in the same town, had infringed their copyrights by

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printing and publishing five illustrations copied from their books.

The Plaintiffs were the draftsmen of the designs of carriages, vans, and other vehicles portrayed in their books, and their principal business was to make drawings of vehicles, and supply copies of the drawings to persons in the carriage trade for advertisements and other trade purposes.

The copies were generally printed by the Plaintiffs themselves, and supplied to the persons requiring them on sheets or other advertising forms.

Occasionally, however, their customers wished to print the designs themselves, with other matter not printed by the Plaintiffs; and in these cases the Plaintiffs, for a pecuniary consideration, supplied the customers with electro blocks of the illustrations intended to be used.

The Plaintiffs had supplied, in manner and for the purposes aforesaid, two electro blocks, taken from two of their designs, to *S. J. Lilley*, who was a carriage builder at *Leicester*. He used the blocks for printing his own advertisements, and afterwards allowed the Defendants to print from them two of the illustrations complained of in the action.

There was not any written licence from the Plaintiffs to *Lilley*, or from him to the Defendants, and there was no written agreement between these persons or any of them with reference to the use of the electros.

At the trial the Court found that the other three drawings complained of were copied from the Plaintiffs' books.

Of the five drawings, one was taken from each of two books of the Plaintiffs, and the other three were taken from their third book.

The action was tried before Mr. Justice *Romer* on the 24th and 25th of February, 1895.

Scrutton, for the Plaintiffs:—

Sect. 15 of the *Copyright Act*, 1842, requires a licence to be in writing. *Lilley* himself had no licence on which he could rely in law, and he cannot put the Defendants in a better position than that which he holds. Even if he had had a licence in

writing enabling him to do what it was intended he should do when the blocks were sold to him, he could not, whether verbally or by writing, have allowed the Defendants to use the blocks for their purposes.

There was no assignment of the copyright by selling the electro blocks. The electros were not new designs. They were taken by the Plaintiffs from the original illustrations in their own books.

Neville, Q.C., and *Dunham*, for the Defendants :—

Where the block of a design is purchased, with a view to reproducing the design, no one can prevent the purchaser from using it.

[ROMER J. :—The question is whether consent, which is not in writing, to the use of the block gives the right to authorize other people to use it.]

It is not a question of licence, but whether the right to use the block is not sold out and out. Having received the money for the block, the Plaintiffs cannot confine the purchaser to the use of it for a particular purpose only. To permit that to be done would be to stop a man from putting the thing purchased to the only use to which it could be put.

[They referred on this point to *Sweet* v. *Benning* (1) ; *Grace* v. *Newman* (2).]

The Plaintiffs have only the copyright in the books—not in the particular designs. They have not complied with the statutory requirements as to designs.

The Defendants have not taken such a material or substantial part of the Plaintiffs' books as to give the Plaintiffs a right of action : *Chatterton* v. *Cave* (3).

[ROMER J. :—Would not a man be liable to an action if he took one of Mr. *Tenniel's* pictures from *Punch* ?]

It has been said that reproducing a single picture for an entirely different object from that which the first publishers had in view is not piracy : *Bradbury* v. *Hotten* (4).

(1) 16 C. B. 459.
(2) Law Rep. 19 Eq. 623.
(3) 3 App. Cas. 483, 491.
(4) Law Rep. 8 Ex. 1, 5.

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Scrutton, in reply:—

A sufficient portion of the Plaintiffs' work has been taken to entitle them to relief. In each case the Court must look at the object with which the matter has been taken, *e.g.*, whether it was for merely critical purposes: *Campbell* v. *Scott* (1); *Bradbury* v. *Hotten* (2).

1895. Mar. 7. ROMER J.:—

The Plaintiffs were undoubtedly the draftsmen of the drawings of carriages forming the books, the subject of this action, and the owners of the copyright in those books; and there has been due registration under the *Copyright Acts*, enabling them to sue for infringement of their copyrights. And on the evidence it is clear that the five drawings, the subject of the action, which have been printed and published by the Defendants, are copies of the corresponding five drawings contained in the Plaintiffs' books. As to three of them this was not disputed, and as to the remaining two I am satisfied that, in fact, they were copies from the Plaintiffs' drawings, made respectively by the Defendants' witnesses, *Johnson* and *Wakerley*; so that, *primâ facie*, the Plaintiffs are entitled to succeed in this action.

Now, before I consider the two grounds of defence urged before me on behalf of the Defendants, it is necessary to bear in mind certain facts.

The Plaintiffs' principal business is to make drawings of carriages of novel shape, and to supply copies of these, as required, to members of the carriage trade for advertisement and other purposes of their trade. These copies are generally printed by the Plaintiffs on sheets or other advertising forms, and supplied by them in that way. But occasionally some member of the trade wants to print one or more drawings in or on some advertisement which is not printed by the Plaintiffs, and then, to enable him to do this, the Plaintiffs, for a money payment, supply him with electro blocks of the drawings required.

Now, the first ground of defence, which only relates to two of the drawings, is that the Defendants were authorized to print

(1) 11 Sim. 31. (2) Law Rep. 8 Ex. 1, 5.

and publish these by one *Lilley*, whom the Plaintiffs had supplied, in the manner and for the purpose above mentioned, with electro blocks of the drawings, and it is said that this authority is an answer to the Plaintiffs' claim. But this ground, in my opinion, is untenable. By supplying the blocks to *Lilley* the Plaintiffs did not assign to him any copyright in the drawings which was previously vested in them, and sect. 18 of the *Copyright Act* (5 & 6 Vict. c. 45) does not apply. The effect of the sale of the blocks to *Lilley* was, in my opinion, to authorize him personally to print therefrom, and use the copies for the purposes of his advertisement and trade. It did not authorize any one else to print or publish copies, and, in my opinion, certainly did not enable *Lilley* to authorize the Defendants, as against the Plaintiffs, to print and publish the two drawings in question. *Lilley*, in fact, had a licence from the Plaintiffs which was not assignable by him.

The Defendants try to make out that the sale of the blocks had the effect of conferring on *Lilley* the copyright in the blocks, and not merely a licence to use them. But I cannot see how this is established. The copyright was previously existing in the Plaintiffs, and the sale of the blocks could not have had the effect of an assignment of copyright; and, indeed, I am satisfied that the meaning and intent of the transaction, as between the Plaintiffs and *Lilley*, was that the sale of the blocks should authorize *Lilley* personally to print therefrom for the purposes of his advertisements and trade, and should confer no other right on him, and have no other operation or effect. It is said that a difficulty arises if the effect was only a licence or consent to copy, because the licence or consent was not in writing, as required by the *Copyright Act* (5 & 6 Vict. c. 45); but an equal difficulty arises with regard to an assignment, for that, to be valid, must also be in writing.

And, in truth, the difficulty as to the licence is more apparent than real; for if the Plaintiffs, after selling the blocks to *Lilley*, had (which is most unlikely) tried to prevent his personally using them, or sued him in damages for having used them in his trade as intended, the Court, on ascertaining the facts, would probably have considered the conduct of the Plaintiffs fraudulent,

ROMER J. 1895 COOPER v. STEPHENS.

and refused them an injunction or any substantial damages, and made them pay costs.

The other ground of defence is that no substantial part of the books in question has been taken by the Defendants. But, in considering a question of infringement like this, it is important to consider the intent of the copyist and the nature of his work, as was observed by Lord Chief Baron *Kelly* in *Bradbury* v. *Hotten* (1). In the present case I observe that the Defendants are using the five drawings complained of for the very purpose for which the originals were made by the Plaintiffs, and so as to escape from making any payment to the Plaintiffs in respect of their rights in the drawings. And I cannot help seeing that, if the Defendants are allowed with impunity to do what they have done, the Plaintiffs' copyright will be rendered practically valueless, and, in fact, destroyed. Clearly, in a great many cases, the trade only want one or two drawings for their advertisements, and if each member is allowed to steal one or two, the result must be that the Plaintiffs' rights will be wholly lost. And, although in this case there is only one drawing taken from each of two books of the Plaintiffs, and three from another book, yet the total makes up five-sixths of all the drawings of carriages in the carriage-makers' advertisements inserted in the publication complained of. I hold, therefore, that this ground of defence also fails, and I accordingly grant to the Plaintiffs the injunction asked for by them, and 40*s.* damages and costs.

Solicitor for Plaintiffs: *W. Smee.*

Solicitors for Defendants: *Morse & Simpson*, agents for *Parsons & Davis, Leicester.*

(1) Law Rep. 8 Ex. 5.

F. E.

ROMER J.
1895
March 8.

In re SILVESTER.
MIDLAND RAILWAY COMPANY *v.* SILVESTER.

[1894 S. 3128.]

Principal and Surety—Express Power to give Notice determining Liability of Guarantor—Effect of Notice only of Guarantor's Death—Meaning of "Representatives."

A joint and several continuing guaranty bond provided that the obligors, or any one or more of them, or their respective "representatives," might determine their or his liability by a month's notice in writing to the obligees. One of the obligors having died, his executor, who was unaware of the bond, gave the obligees notice only of his death :—

Held, that "representatives" included executors, and that, notwithstanding the notice, the estate of the deceased obligor was liable for indebtedness incurred by the principal debtors after his death.

Observations of *Bowen* J. in *Coulthart* v. *Clementson* (1) considered.

BY a bond under their hands and seals, and dated the 26th of July, 1881, *S. Stokes*, *W. H. Duignan*, *L. W. Lewis*, *William Silvester*, *T. A. Negus*, and *F. W. Cotton* became bound to pay the *Midland Railway Company* the sum of £1000, the obligors declaring as follows: "For which payment, to be well and truly made, we bind ourselves and each of us and any two of us, our, and each of our, and any two of our heirs, executors, and administrators jointly, severally and respectively, firmly by these presents."

The bond then recited that the above-named obligors were the directors of the *Ystradgunlais and Swansea Colliery Company, Limited*, and that it had been agreed that the colliery company should open an account with the railway company for the carriage of coal and other goods, and declared as follows :—

"Now, therefore, the condition of the above written obligation is such that, if the colliery company or their successors should not from time to time and at all times hereafter . . . punctually pay or cause to be paid unto the said *Midland Railway Company*, their successors or assigns, all and every such sum and sums of money as shall become due from the colliery company to the

(1) 5 Q. B. D. 42, 48.

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said *Midland Railway Company*, their successors or assigns, upon the said account so agreed to be opened between the said companies as hereinbefore mentioned, as and when such sums of money shall become due and payable according to the terms of business of the said *Midland Railway Company*, Then, if the obligors, or any or either of them, their or any or either of their heirs, executors, or administrators should well and truly pay or cause to be paid unto them, the said *Midland Railway Company*, their successors or assigns, such sum or sums of money so to become due and payable as aforesaid, then the above written bond or obligation shall be void and of no effect, but otherwise shall be and remain in full force and virtue: Provided always that the obligors, or any one or more of them, or their respective representatives, may at any time determine their or his liability under the above written bond by one calendar month's notice in writing to be given to the said railway company, but such determination by any one or more of the obligors, or their representatives, shall not prevent the continuance of the liability of the others or other of them."

The colliery company, down to October, 1892, paid everything due on their account with the railway company; but on the 8th of June, 1893, the colliery company passed an extraordinary resolution in favour of winding up voluntarily, and an order was afterwards made continuing the voluntary winding-up under the supervision of the Court, and at the commencement of the liquidation the sum of £594 12*s.* 7*d.* was due to the railway company on the account, in respect of carriage of coal and other goods from October, 1892, to June, 1893.

Some of the obligors other than *William Silvester* paid off £250, leaving £344 12*s.* 7*d.* due on the account; and the railway company in August, 1894, commenced an action, on behalf of themselves and the other creditors of *William Silvester*, against his sole surviving executor and devisee in trust (who was also called *William Silvester*), for a declaration that the estate of the testator was liable to pay the balance of £344 12*s.* 7*d.*, and, in case the Defendant should not admit assets, for administration of the testator's real and personal estate.

The testator had died on the 20th of May, 1886; but neither

of his executors had any knowledge of the existence of the bond, and no claim on the estate in respect of it was made until shortly before the commencement of the action.

On the 26th of August, 1886, the Defendant wrote to the Plaintiff's secretary as follows: "I regret to inform you of the death of my father, *William Silvester*, and enclose dividend warrant to be made payable in favour of his executors," whose names and addresses were then stated. "I also send probate for registration, which please return as soon as possible. . . "

No notice was ever given determining the liability of the testator or his executors under the bond.

The action was tried on the 8th of March, 1895.

Neville, Q.C., and *William Baker*, for the Plaintiffs:—

The death of the surety does not operate as a revocation of a continuing guaranty: *Bradbury* v. *Morgan* (1); *Harriss* v. *Fawcett* (2); *Beckett* v. *Addyman* (3); *In re Sherry* (4). And notice of the obligor's death is not necessarily sufficient to determine his liability. It may suffice if the bond omits to state what notice is to be given in case of the obligor's death; but if a special mode of determining liability is pointed out, that mode must be followed: *Coulthart* v. *Clementson* (5).

[They also referred, on this point, to *Lloyd's* v. *Harper* (6).]

In the present case, in order to determine the liability, a notice in writing from the "representatives" was required. That word means "legal personal representatives." The only other meaning which could be attached to it is "agents"; but the notice is not required to be under the hand of an obligor, and an agent could therefore give the notice without any special power to do so being given to him by the bond.

Horton Smith, Q.C., and *E. F. Ball* (*W. Freeman*, with them), for the Defendant:—

The bond only provides for determination of the liability by notice in the obligor's lifetime, and as it is silent as to notice

(1) 1 H. & C. 249.
(2) Law Rep. 8 Ch. 866.
(3) 9 Q. B. D. 783.
(4) 25 Ch. D. 692.
(5) 5 Q. B. D. 42.
(6) 16 Ch. D. 290.

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being given after his death, notice of the death is sufficient to determine the liability: *Coulthart* v. *Clementson* (1).

"Representatives" means agents of the obligor in his lifetime —not legal personal representatives. When the draftsman of the bond wished to refer to legal personal representatives, he mentioned executors and administrators. The word "representatives" was therefore used in a different sense, and would include agents, donees of a power of attorney, trustees in bankruptcy, and assignees of a business.

ROMER J.:—

In my judgment, the Plaintiffs are right in this case.

The bond sued upon contains at the end of it the following proviso. [His Lordship read it, and continued:—]

I must first consider what is the meaning of the word "representatives." Looking at the proviso as a whole, I think that the word includes the legal personal representatives of the obligors. The clause means that the liability of the representatives of a deceased obligor, including his executors and administrators, is to be determined, like the liability of the obligor in his lifetime, only by one calendar month's notice in writing being given.

That being so, the case before me is exactly that referred to by Lord Justice (then Mr. Justice) *Bowen* in *Coulthart* v. *Clementson* (2), where he says: "If, indeed, the contracting parties desire that on the death of the guarantor a special notice shall be necessary to determine the guarantee, they can so provide in the guarantee itself; and such a provision will, of course, bind the estate." I agree with that observation, and I think that on such a contract as this the Plaintiffs were entitled to rely on the express provisions of the contract with them, and were not bound to take the notice of the obligor's death as a notice from his executors to determine the liability. The proviso freed the Plaintiffs from being bound by any implied notice of or being bound to make inquiry as to whether there would be any breach of trust on the part of the executors in not giving notice to determine the liability. It is admitted, or, I should say, could not be disputed,

(1) 5 Q. B. D. 42, 47. (2) 5 Q. B. D. 42, 48.

that notice in writing to determine the liability was not given by the executors, and, that being so, in my judgment, the estate remained liable.

I desire to add that I do not assent to the general proposition that where a person who is entitled to the benefits of a contract of guaranty has notice of the death of the guarantor and that he left a will, he is, without more, affected with notice of the contents of the will, or is bound to assume that *primâ facie* it would be a breach of trust on the part of the executor not to give notice to determine the liability. And with great respect to that distinguished Judge, I do not admit the validity of part of the reasoning on which Mr. Justice *Bowen* based his decision in *Coulthart* v. *Clementson* (1).

Solicitors for Plaintiffs: *Beale & Co.*

Solicitors for Defendant: *Makinson, Carpenter & Son,* agents for *C. H. Twynam, Stafford.*

(1) 5 Q. B. D. 42.

F. E.

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In re BANK OF SOUTH AUSTRALIA (2).

[00310 of 1894.]

Company—Winding-up by Order of the Court—Petition—Debt due under Agreement with Voluntary Liquidator—Sale of Assets by Liquidator—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 95, 133 (*sub-s.* 7), 145, 161.

A debt due from a company under an agreement between it and its voluntary liquidators and another person is sufficient to support a petition by that person for winding up the company by the Court.

Special resolutions were passed by the *S. Company* for voluntary winding-up, and appointing liquidators, who were thereby authorized to enter into an agreement with the *U. Company* for the transfer to them of the *S. Company's* assets and liabilities. By the agreement subsequently entered into the *U. Company* were to pay the debts of the *S. Company*; the amount paid, so far as it was not covered by the proceeds of realizing the assets, was to be treated as a debt due by the *S. Company* to the *U. Company*; and the liquidators were to make such calls on the shareholders of the *S. Company* as should be necessary to make up the deficiency :—

Held, by *Vaughan Williams* J., and by the Court of Appeal, that sects. 95 and 133 of the *Companies Act*, 1862, empowered the liquidators to enter into the agreement.

In re Bank of South Australia (1) doubted.

THE *South Australian Banking Company* was incorporated in 1847 by a Royal Charter, which reserved power to the Crown, acting by the Treasury, to revoke the powers and provisions of the charter if the company should fail to maintain such provisions, and declared that, in the event of such revocation, it should not be lawful for the company to carry on the business of a banker, and that if it suspended payment in specie, it should be unlawful for it to issue notes, although its other powers had not been revoked. The charter further provided that in case of such revocation of powers, the assets, including the amounts remaining unpaid by the proprietors of shares on account of their shares (which were to be forthwith called up and paid) should be applied in paying the company's debts and liabilities, and that the surplus, if any, should be divided among the shareholders; and thereupon the Crown was empowered to revoke the

(1) [1894] 3 Ch. 722.

charter itself, whereupon the corporation was to be absolutely dissolved.

The charter also provided that, in the event of such revocation of privileges, the proprietors of the capital of the company should be called on to contribute to the payment of the debts and liabilities of the company to the extent of twice the amount of their subscribed shares—namely, for the amount subscribed, or so much thereof as should not have been previously paid up, and for an additional amount equal to the amount subscribed.

In 1866 a supplemental charter was granted, prolonging the term originally allowed for the continuance of the company, the further term being limited so as to expire on the 3rd of September, 1889; and the name of the company was changed to the "*Bank of South Australia.*"

By the *Bank of South Australia Act,* 1884 (47 & 48 Vict. c. clxxviii.), the company was empowered to register itself as a limited company, by the name of the *Bank of South Australia, Limited*, under the *Companies Acts*, 1862 to 1880, with the constitution and powers defined by the charters as modified and extended by the Act, and the charters were to cease and determine as from the 31st of December, 1884, or any earlier day on which the bank might have obtained a certificate of registration as a company with limited liability under the Acts aforesaid. The Act of 1884 also put an end to the powers of the Treasury under the charter, and substituted for the Treasury's consent in certain cases the sanction of the members testified by special resolution.

Sect. 7 of the Act of 1884 was as follows: "Notwithstanding anything in the *Companies Acts*, 1862 to 1880, contained, the liability of the shareholders or members of the bank, in the event of the powers of the bank being determined and the affairs wound up, shall, after the bank is registered as aforesaid, as well in respect of notes issued by the bank, subject as hereinafter mentioned, as of other debts and liabilities of the bank, continue to be in accordance with the limited liability defined by the said original charter as amended by the said supplemental charter, that is to say, the extent thereof shall be twice the amount of the subscribed shares as in the said charter mentioned. Provided

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always that the limitation of the liability of the members of the bank in respect of notes issued by them shall cease and determine upon the expiration of seven years from the date of such registration as aforesaid, and thereupon sect. 6 of the *Companies Act*, 1879, shall apply to the bank and the members thereof."

By sect. 6 of the *Companies Act*, 1879, a bank of issue registered as a limited company is not entitled to limited liability in respect of its notes, and the members thereof continue liable in respect of its notes as if it had been registered as an unlimited company.

The bank was registered under the Act of 1884 on the 30th of December, 1884.

In the beginning of the year 1892 negotiations were entered into for the taking over by the *Union Bank of Australia, Limited*, of the assets and business of the *Bank of South Australia*, and an agreement was prepared containing the terms upon which it was proposed that the assets and business should be taken over.

By special resolutions of the *Bank of South Australia*, respectively passed and confirmed at general meetings held in March and April, 1892, it was, amongst other things, resolved that the bank should be wound up voluntarily, and that three persons named should be appointed liquidators for the purpose of the winding-up, and that the liquidators should be authorized to enter into the agreement with the *Union Bank*.

By an agreement dated the 11th of April, 1892, and made between the *Bank of South Australia* and its liquidators of the one part, and the *Union Bank* of the other part, it was agreed that the *Bank of South Australia* and its liquidators should transfer, and the *Union Bank* should take over (with certain exceptions), all and singular the lands, buildings, goods, chattels, moneys, credits, debts, bills, notes, and things in action of the transferring bank, and the undertaking, business, and goodwill thereof, and all other its real and personal property, subject to any charges or incumbrances affecting the same.

As the consideration for the transfer, the *Union Bank* were to undertake, pay, satisfy, and discharge all the debts, liabilities, and obligations of the other bank, to adopt and perform all its

contracts, and keep it and its liquidators and contributories indemnified against the same.

The transfer was to take effect as from the date of the agreement.

The goodwill of the *Bank of South Australia* was not to be included in the valuation of the assets handed over.

Clause 8 of the agreement provided that if the aggregate amount of the value of the assets, to be ascertained as therein mentioned, should exceed the aggregate amount of the debts and liabilities of the *Bank of South Australia* to be discharged by the *Union Bank* under the agreement, and the moneys paid by the *Union Bank* in respect of the liquidation, the *Union Bank* should pay to the liquidators the difference, with interest at 5 per cent. from the date of the agreement; but that if the aggregate amount of the value of the assets, to be ascertained as therein mentioned, should be less than the aggregate amount of the debts and liabilities and of the moneys paid by the *Union Bank* in respect of the liquidation, the *Union Bank* should, out of the proceeds of the realization of certain assets specified in a schedule, retain the amount of the deficiency, with interest; and in case those proceeds should be insufficient to pay the amount of such deficiency and interest, the amount should be and be "deemed and treated as being a debt" due by the transferring bank to the *Union Bank*.

The excepted assets consisted of certain debts owing to the *Bank of South Australia*. These were to be realized by the *Union Bank*, as agents for the other bank, with the assistance of the liquidators, and the net proceeds (subject to the retention thereout by the *Union Bank* of the amounts in the agreement referred to) were to be paid by the *Union Bank* to the liquidators and to be applied for the benefit of the shareholders of the *Bank of South Australia*.

Clause 14 of the agreement provided that if the assets of the South Australian Bank in the hands of the liquidators should not be sufficient to pay and discharge "any debt due and payable to the *Union Bank* under these presents, the liquidators . . . . shall, so far as they legally can or may, make such a call or such calls upon the contributories of the South Australian Bank as may be

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necessary to raise the amount required to pay and discharge such debt or liability."

In April, 1894, the *Union Bank* presented a petition in which they alleged the facts stated above, and also stated that under the agreement they had paid debts and liabilities of the *Bank of South Australia*, which were legally enforceable against it, as at the date of the said agreement, to the amount of £3,000,000, and that it had been ascertained and was admitted that under the agreement a sum of £250,000 and upwards was then due and owing by the *Bank of South Australia* to the Petitioners. The Petitioners also stated that they had required the liquidators to pay them that amount, and if necessary make a call or calls for the purpose; but that the liquidators had paid nothing on account, and had declined to make any call on the grounds, (1.) that no liability on the part of the shareholders remained, after registration under the *Companies Acts*, beyond the original amount per share, (which had been all fully paid), and (2.) that the agreement could not be relied upon as legally justifying the making of a call for any debt newly created by the agreement.

And the Petitioners therefore asked that the voluntary winding-up might be continued under the supervision of the Court.

This petition was dismissed by Mr. Justice *Vaughan Williams* on the 9th of August, 1894, on the ground that the Petitioners had no *locus standi* to present a petition, inasmuch as their debt, having been incurred after the *Bank of South Australia* had gone into liquidation, was not provable in the liquidation (1).

The liquidators having made no application in the winding-up to obtain the direction of the Court as to whether a call could be made, the *Union Bank* presented a petition asking that the *Bank of South Australia* might be wound up by the Court. The petition came on for hearing before Mr. Justice *Vaughan Williams* on the 5th of December, 1894.

Finlay, Q.C., *Beale*, Q.C., and *S. Dickinson*, for the Petitioners:—

Under the agreement moneys have been paid by the Petitioners which are in excess of anything received, or which can be

(1) [1894] 3 Ch. 722.

received, by them in respect of the assets of the *Bank of South Australia*.

There is, therefore, a debt due to the Petitioners from the bank, which arose after the voluntary winding-up commenced, but before the present petition was filed.

It has been held that that debt is not sufficient to support a petition asking that the voluntary winding-up may be continued under the supervision of the Court: *In re Bank of South Australia* (1).

The debt can only be provided for by means of a call, which the liquidators refuse to make in the voluntary winding-up, and, inasmuch as a supervision order cannot be made, the only way in which the right of the Petitioners can be enforced is by means of a winding-up by order of the Court.

Buckley, Q.C., and *George Lawrence*, for the liquidators of the *Bank of South Australia*:—

Under the agreement all the creditors are to be paid by the Petitioners, and therefore the liquidators are only concerned to argue this case in the interest of the shareholders.

A winding-up order will not be made unless there is something to be done under such an order. Nothing can be done under such an order in this case except to make a call if such a call is justified, and, unless the point is decided against the shareholders, there is no reason for making the winding-up order.

On the construction of the charters of the *Bank of South Australia* and its special Act of 1884, there is no power, in the events which have happened, to make a call on the shareholders. The liability does not arise unless the Crown exercises its right of revocation, which power exists notwithstanding the Act.

Under the agreement the Petitioners take all the assets, but they pay nothing for the goodwill, and the *Bank of South Australia* had not power, on going into liquidation, to enter into an agreement creating a debt including interest and excluding the value of the goodwill.

Moreover, the agreement is bad, because it purports to hand

(1) [1894] 3 Ch. 722.

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over the duties and obligations of winding-up to some one other than the liquidators and free from their control.

Ingle Joyce (*Cozens-Hardy*, Q.C., with him), for a committee of the shareholders of the *Bank of South Australia*:—

The petition is presented on the ground that the Petitioners are "prejudiced by the voluntary winding-up," within the meaning of sect. 145 of the *Companies Act*, 1862.

[Vaughan Williams J.:—That must mean by the continuance of the winding-up.]

If the liquidators had power to create a debt by the agreement, the Petitioners can prove in the voluntary winding-up, and therefore it does not prejudice them. But this agreement is not in accordance with sect. 161 of the *Companies Act*, 1862, and the liquidators had no power by this agreement to create the liability on which the petition is founded: *Buckley* on Companies (1); *Clinch* v. *Financial Corporation* (2).

[Vaughan Williams J. referred to sect. 133 of the *Companies Act*, 1862.]

The liquidators had no power to sell in such a way as to impose on the company or its shareholders a new and original liability to some one who was not its creditor.

I adopt the argument addressed to the Court on behalf of the liquidators as to the construction of the charters and the Act of 1884.

Finlay, in reply:—

The agreement created a debt due from the *Bank of South Australia* to the Petitioners, and, as all the assets were handed over to the latter, the only fund out of which they could possibly be paid was this reserve liability. After registration the *Bank of South Australia* became a company incorporated under the *Companies Acts*. The charter then came to an end, and, under sect. 7 of the Act of 1884, on the winding-up taking place, the liability of the shareholders became twice the amount of the subscribed

(1) 6th Ed. p. 390. (2) Law Rep. 4 Ch. 117, 121.

shares. It was on the footing of that being the proper construction of the section that the agreement was entered into and liability was incurred by the Petitioners.

If one part of the agreement is *ultra vires*, the whole of it is. In that case the assets must be handed back; but as the Petitioners have paid off the debts of undoubted creditors of the *Bank of South Australia*, the Petitioners are entitled to be subrogated to the rights of those creditors.

If the agreement is valid, it creates a debt, due from the *Bank of South Australia*, which gives the Petitioners the ordinary rights of creditors, and the execution of the voluntary winding-up will not be allowed to prejudice those rights.

The liquidators had power to sell all the assets and transfer them and the liabilities under sects. 95 and 133 of the *Companies Act*, 1862, and what was done by them was a beneficial arrangement.

It was not *ultra vires* to agree to make the call, for it is only by means of a call that any deficiency can be met.

Vaughan Williams J.:—

This is a petition for the winding up by the Court of the *Bank of South Australia, Limited*, and the main question which I have to decide is as to the construction of sect. 7 of the *Bank of South Australia Act*, 1884.

[His Lordship then stated the effect of that Act and the charters, and held that sect. 7 of the Act referred to a winding-up in the ordinary sense of the word, and not to the winding-up consequent upon the revocation of the powers under the charters; and consequently that, after registration under the *Companies Acts*, 1862 to 1880, the immediate result was that the shareholders were subject to liability to the extent of £25 per share in so far as the general debts and liabilities were concerned, and were subject to unlimited liability in respect of the note issue, though for seven years from the registration the liability in respect of the note issue was limited. His Lordship then proceeded as follows:—]

Taking that view of the Act of 1884, it seems to follow that the liquidators in the winding-up have the right and the duty to

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call up this additional £25 in so far as it is necessary to do so for the purposes of the liquidation.

[His Lordship referred to the resolutions and the agreement, and continued as follows:—]

The Petitioners have since the liquidation paid debts, including the note issue of the *Bank of South Australia*, to an amount which, admittedly, largely exceeds the assets collected or valued under the agreement, and they claim that that is a debt due from the *Bank of South Australia* to the Petitioners.

It seems to me perfectly clear under this agreement that a debt has arisen, and that there is nothing in the agreement which is inconsistent with the right and duty of the liquidators, if a winding-up order is made, to call up this amount of reserve liability.

Then it is said that the whole agreement is *ultra vires*; but I cannot assent to that. Although the agreement does not fall within sect. 161 of the *Companies Act*, 1862, it is quite a fallacy to suppose that it is therefore *ultra vires*. It seems to me that, if sects. 95 and 133 of the Act of 1862 are looked at, it is reasonably plain that the Respondent bank and its liquidators had a right to enter into an agreement for the sale and transfer of the assets to the *Union Bank* upon the terms contained in this agreement. Then it was suggested that if this amount were called up for the purpose of discharging the obligations of the company under this agreement, that would not be a proper purpose to be carried out in the course of the liquidation. I do not agree with that suggestion.

It is said that this is not a debt of the company which is sufficient to support the petition, because it is a debt which only accrued after the company had gone into voluntary liquidation; but I cannot assent to that argument. It is true that it is only a debt which arose after the company had gone into voluntary liquidation, and for that reason I held, upon a prior application, that the *Union Bank*, as such creditors, had no right to an order continuing the voluntary winding-up under the supervision of the Court, because they were not creditors entitled to rank upon the estate in that voluntary liquidation. Their position was, that they were entitled, not to a dividend, but, if at all, to be

paid in full by the liquidators or out of the estate of the company; but that does not in the slightest degree shew that the debt is not a debt of the company.

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In my judgment, the debt, although contracted subsequently to the commencement of the liquidation, is a debt of the company, and, that being so, I see nothing in principle or in express provision to prevent such a debt being made the basis of a petition for winding up by the Court. Under these circumstances I shall make the order asked for.

F. E.

The contributories of the *Bank of South Australia* appealed. The appeal came on for hearing on the 26th of February, 1895.

C. A.

Cozens-Hardy, Q.C., *Buckley*, Q.C., and *Ingle Joyce*, for the Appellants:—

Upon the true construction of the *Bank of South Australia Act* of 1884, no call can now be made on the shareholders who have paid up their shares, and therefore the winding-up order would be useless. The charter reserved power to the Crown to revoke the powers of the bank if they failed to perform certain conditions, in which case the liability of the shareholders was to be doubled. Then the 7th section of the Act of 1884 provides that, in the event of the powers of the bank being determined and the affairs of the bank wound up, that increased liability is to attach to the shareholders. But the bank have never broken the conditions, and their powers have never been determined; therefore the only liability of the shareholders is that imposed by the *Companies Acts*, namely to the extent of the nominal amount of their shares, which in this case have been all paid up.

But, supposing there is some liability of the shareholders, the *Union Bank* have no debt on which to found a petition for a winding-up order. In the first place, the agreement between the liquidators and the *Union Bank* was *ultra vires* and void, and no debt could arise under it. The liquidators have no power to transfer the uncalled capital of the company, or to impose an additional liability on the shareholders, such as interest on advances by the *Union Bank*: *Imperial Bank of China, India,*

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and Japan v. *Bank of Hindustan, China, and Japan* (1); *Clinch* v. *Financial Corporation* (2); *In re East of England Banking Company* (3). The *Union Bank* do not claim under the original creditors, but under the guarantee given by the liquidators, which they had no power to give.

In the second place, the debt, if valid, was incurred after the commencement of the winding-up, and was incurred, not by the company as a going concern, but by the liquidators. If the *Union Bank* have any cause of action, they must bring an action against the liquidators, and cannot prove for the debt in the winding up of the company. It has been already decided that they cannot prove in the voluntary winding-up (4), and that decision has not been appealed from; and the principle would apply equally to a proof in a compulsory winding-up if a winding-up order were made.

Finlay, Q.C., *Beale*, Q.C., and *S. Dickinson*, for the *Union Bank*:—

As to the construction of the Act, the charter was at an end as soon as the company was registered, and the Crown had no longer any power to determine the powers of the bank. Therefore the 7th section of the Act cannot refer to any revocation of the powers by the Crown, but must refer to the winding up of the company, which is the only way whereby its powers can now be terminated. The obvious meaning of the clause, though it is not very skilfully drawn, is that the liability of the shareholders in case of a winding-up should be double the amount of the subscribed capital.

With respect to the debt now due to the *Union Bank*, the agreement was perfectly valid. The liquidators might have borrowed the money to pay the liabilities of the company and have charged the shareholders with interest on the advances; and the transfer of the assets was quite within their powers. In *In re East of England Banking Company*, the liquidator had altered the extent of the liability of the shareholders, and that

(1) Law Rep. 6 Eq. 91.
(2) Ibid. 5 Eq. 450; 4 Ch. 117.
(3) Ibid. 4 Ch. 14.
(4) See *In re Bank of South Australia* ([1894] 3 Ch. 722).

has not been done here. As to the time at which the debt accrued, our claim did not really arise subsequently to the commencement of the winding-up. The resolution to wind up was founded on the agreement. The event which determined the amount due happened after the resolution, but the liability was created before it. It was, therefore, a debt of the company: *Hire Purchase Furnishing Company* v. *Richens* (1); *Stone* v. *City and County Bank* (2). If the agreement is invalid, the *Union Bank* would be entitled to stand in the place of the creditors for the advances which they have made to them, and would have a lien upon the assets: *Clinch* v. *Financial Corporation* (3).

Cozens-Hardy, in reply.

Lord Halsbury:—

I am of opinion that this appeal must be dismissed. The first question is, what is the true construction of the Act of 1884? [His Lordship reviewed the provisions of the charters and of the Act of 1884, and came to the conclusion that the meaning of sect. 7 was, that, in the event of the bank being wound up, and the powers of the bank being thereby determined, the liability of the shareholders was to be double the amount of their shares. His Lordship continued:—] As regards the second point, I confess that I have had some difficulty in following the argument. This company was hopelessly in debt. At a general meeting of the shareholders—whether absent or present is immaterial, because I am of opinion that it was well within their powers—it was determined to wind up the bank, and, for the purpose of paying their debts, which has been in fact accomplished to the extent of £3,000,000, they agreed to enter into this bargain with the *Union Bank*, a bargain which practically amounted to a sale of their assets upon certain terms. £3,000,000 of their debt has been in fact paid, and now, having entered into this bargain, they say that the price which they have agreed to pay is not a debt. I think it is. The shortest mode of answering that proposition is by saying that the price is a debt, and I do

(1) 20 Q. B. D. 387.
(2) 3 C. P. D. 282.
(3) Law Rep. 5 Eq. 450; 4 Ch. 117.

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not think one can give a better reason for it than by saying that the transaction is a sale of the assets.

Then it is said that, though a debt, it is, nevertheless, not such a debt as can be made the subject of a petition for winding up the company. I confess I am wholly unable to understand that proposition. Where there is a voluntary winding-up, you may, until you are restrained by the Court, bring an action against the company and recover judgment; and it would certainly be a very odd condition of the law if, when you had recovered a judgment, the only mode in which you could enforce it against the company would be by seizing its effects, and not by way of winding it up. It seems to me that there is no foundation for that contention, and I think, therefore, upon the second point also the Appellants fail.

I do not intend to comment upon the earlier decision of my Brother *Vaughan Williams* in this case (1). It is not before us, and at present I confess I have some difficulty in understanding it. If I do understand it, I am not prepared to say I should follow it. But, inasmuch as that decision is not now before us for adjudication, it is enough for me to say that it is beside the present question.

Therefore, in my opinion, this appeal should be dismissed with costs.

Lindley L.J.:—

I am of the same opinion.

[His Lordship then referred to the charters and the Act of 1884, coming to the conclusion that, in the event of the winding up of the bank, the shareholders were to be liable to the extent of twice the amount of their shares. He continued:—]

We come now to the agreement of the 11th of April, 1892, with the *Union Bank*, and it is said that this agreement is *ultra vires*. It is an agreement under the seal of the bank—an agreement between the *Bank of South Australia* on the one side and the *Union Bank* on the other. The liquidators are made parties because of the position of the affairs of the bank. Now, what

(1) [1894] 3 Ch. 722.

was the position of affairs which led to this agreement? The *Bank of South Australia* was hopelessly in difficulties. It had incurred debts which it could not meet. I do not mean that its assets might not have realized sufficient to pay 20*s.* in the £, but of course a bank is in difficulties if it cannot realize its assets immediately. The bank had debts which it was necessary to meet in the ordinary course of business, to the extent of three millions of money, and it had not got available assets to meet those debts. A meeting of the shareholders was convened. The recitals in the agreement explain the position of affairs with sufficient precision. The agreement says: "Whereas prior to the passing of the resolutions next hereinafter mentioned, it was agreed between the two above-mentioned companies"—that is, the *Bank of South Australia* and the *Union Bank*—"that the business of the South Australian Bank should be transferred to the *Union Bank*, and that the South Australian Bank should be dissolved." Why was this? Because they could not discharge their liabilities. Then by a special resolution of the *Bank of South Australia*, duly passed and confirmed, it was amongst other things resolved that that bank should be wound up, and that certain gentlemen should be appointed liquidators for the purpose of the winding-up, "and that they be and they were thereby authorized to enter into an agreement therein referred to, being these presents." Consider the effect of that. They were in hopeless difficulties, and they had found another bank, the *Union Bank*, which would take over their assets and liabilities upon terms agreed to between them, and, in order to carry out those terms, they had resolved by a special resolution of the shareholders that liquidators should be appointed, and that the bank should be wound up, and that the liquidators should carry out the agreement with the *Union Bank* into which they had deliberately entered. What is there in that arrangement which is surprising, or illegal, or anything of the kind? What is it that they do? First of all, the *Bank of South Australia* transfer to the *Union Bank* the business of the company, their premises and all their assets, including the goodwill, which they get, although, as will appear presently, they have not to pay separately for it. Then the *Union Bank* agree to indemnify the *Bank of*

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South Australia against their debts. Then clause 6 says that the value of the assets shall be ascertained by valuation. In that valuation the goodwill is not to be included—that is, the *Union Bank* are not to pay anything extra for the goodwill. It is not to be taken into account in the valuation. Then comes clause 8, which is the important one, and it is divisible into two parts. The first part is addressed to the possible contingency of the assets of the *Bank of South Australia* exceeding its liabilities, of there being a surplus; and then the *Union Bank*, which will have got the goodwill of the business without having paid anything for it, was to give back the surplus to the *Bank of South Australia*. That is one contingency. The other contingency is this: Suppose that the assets of the *Bank of South Australia* do not suffice to pay their debts and liabilities, which the *Union Bank* are to discharge, what is to be done then? Then "the *Union Bank* shall, out of the proceeds of the realization by them of the assets and property specified in the schedule, retain the amount of such deficiency, together with interest;" and, in the event of those proceeds being insufficient to pay the amount of such deficiency and interest, "the amount thereof shall be deemed and treated as being a debt due by the *Bank of South Australia* to the *Union Bank*." That is to say, if there is a surplus, the *Union Bank* is to hand it over to the *Bank of South Australia*; if there is a deficiency, that deficiency is to be treated as a debt due from the *Bank of South Australia* and bearing interest. What is there wrong in that? What is there unbusinesslike in it? What is there beyond the powers of the company? Nothing that I can see. In substance it comes to this, "If you will take our assets and pay our debts, then if you are under advances to us beyond the value of the assets—if that should be the net result—we will repay you those advances with interest." What is there *ultra vires* in that?

It is said that it is *ultra vires* because the liquidators have no power under the *Companies Act* to enter into such an agreement. It seems to me that that argument is utterly untenable. The powers of liquidators under a voluntary winding-up are the same as those of liquidators under a compulsory winding-up, and if we look through the various clauses of sect. 95 and see

what the liquidators under a compulsory winding-up can do, there is no difficulty in bringing this agreement within those clauses.

Then it is said that there was no power to transfer the uncalled capital, and for this purpose *Clinch* v. *Financial Corporation* (1) was cited. That case appears to me to be very wide of the mark. A case much more like the present is *New Zealand Gold Extraction Company* v. *Peacock* (2). The *Bank of South Australia* was hopelessly in debt. Assuming that I am right as to the construction of the Act of 1884, they could have been compelled to make a call upon their shareholders to the extent of double the amount of the shares in order to supply the deficiency of the assets. Instead of doing that at first, the effect of the agreement is, to put it off, in the hope of not having to do it at all. That cannot be *ultra vires*. It is a mere piece of machinery for deferring the evil day, with the possibility that that evil day may never come at all. It appears to me that there is nothing *ultra vires* in the postponement of the day of payment, or in the agreement by the *Bank of South Australia* to make a call to indemnify the *Union Bank*, if a deficiency should arise, or in the agreement to pay interest. It is said that the payment of interest is shewn to be *ultra vires* by *In re East of England Banking Company* (3). There there was a resolution of the directors shortly before the winding up of that company, which was never communicated to the depositors—a resolution to increase the rate of interest because other banks had done it; that resolution did not bind the company, and the creditors knew nothing about it. The liquidator, without consulting anybody, said that the higher rate of interest should be paid, and the Court held that he had no power to do that. That is very different from the present case, where the liquidators are doing nothing but that which they have been directed to do by the shareholders, who came together to decide what was to be done. This is not a hole and corner bargain by the liquidators. It is a *bonâ fide* agreement come to by the *Bank of South Australia* in the hour of its peril and its distress. They made

(1) Law Rep. 5 Eq. 450; 4 Ch. 117. (2) [1894] 1 Q. B. 622.
(3) Law Rep. 4 Ch. 14.

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the best bargain they could with a solvent company to take over their business, and to relieve them, if possible, from liability; but with this contingent liability, that, if the event should happen which apparently has happened—that is, that the assets taken over should not be enough to discharge the debts—then the deficiency is to be treated as a debt due by the *Bank of South Australia* to the *Union Bank*, and there is the further provision that in case of necessity the liquidators shall make a call on the shareholders of the *Bank of South Australia*.

This brings me to the last point. There is a large debt due under this agreement to the *Union Bank*. How are they to obtain payment? They can bring an action against the *Bank of South Australia*. This was a voluntary winding-up, and the Court might or might not stay this action. If the action were not stayed, they could recover judgment for the amount of the debt. If they did, how would they get paid? Execution on the assets is of course out of the question, because all the assets are in the hands of the *Union Bank*, who are the creditors. How can they force the liquidators to make a call for their payment, except by means of a compulsory winding-up under sect. 145 of the *Companies Act*, 1862? There is no other method. Then is it to be said that a creditor of a company which is being voluntarily wound up—I care not whether the debt was created after the commencement of the voluntary winding-up or not—is it to be said that a creditor may recover judgment against that company, and then be laughed at? He cannot get calls made to satisfy his judgment without a winding-up order: he must therefore have recourse to the winding-up proceedings. The *Union Bank* presented a petition for the winding up of the *Bank of South Australia*, subject to the supervision of the Court. Mr. Justice *Vaughan Williams*, for some reason which I do not think is very satisfactory, thought he could not make a supervision order, and now the *Union Bank* petition for a compulsory winding-up. It seems to me that it would be a most extraordinary thing to say that, because a debt has accrued in the course of the voluntary winding-up, or since the commencement of the voluntary winding-up, therefore the creditor cannot enforce his debt at all. That is what it comes to. Now sect. 145 of the

Companies Act, 1862, which was inserted on purpose to prevent creditors from being defeated, provides that a voluntary winding-up shall not be a bar to the right of any creditor of the company to have the same wound up by the Court, if the Court is of opinion that his rights will be prejudiced by a voluntary winding-up. Any creditor—I care not when his debt accrued—is entitled to ask the Court that a winding-up order may be made, so that assets may be realized for the purpose of his payment, if, as in the present case, there is nothing to be got elsewhere. The appeal ought to be dismissed with costs.

A. L. Smith L.J. :—

I am of the same opinion, and I agree with every word which has fallen from my learned brothers. [After expressing his concurrence as to the construction of sect. 7 of the Act of 1884, his Lordship added :—]

There is one other remark I wish to make. Lord Justice *Lindley* has pointed out that a *fi. fa.* would be useless to enforce a judgment against the company. I am not sure that a *scire facias* might not have been resorted to. But, however that may be, it in no way affects what my Brother *Lindley* has said, and I entirely agree with the judgments which have preceded mine.

Solicitors : *Hollams, Sons, Coward & Hawksley ; Murray, Hutchins, Stirling & Murray.*

W. L. C.

C. A.
1894
May 5, 7.

KEKEWICH J.
1895
Feb. 5, 6; *March* 2.

In re SCOTT AND ALVAREZ'S CONTRACT.

[1893 S. 5097.]

SCOTT *v.* ALVAREZ.

[1894 S. 2933.]

Vendor and Purchaser—Conditions of Sale—Title, restricting Objections to—Legal Estate—Covenants for Title—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78)—*Summons—Order declaring Good Title—Discovery of Material Facts since Order—Proving Bad Title aliunde—Specific Performance—Action—Review—Counter-claim—Form of Judgment—Executor—Legal Personal Representative—Mortgage for his own Benefit—Breach of Trust—Conveyance of all Estate.*

On the sale by auction by a mortgagee of a leasehold house, one of the conditions of sale provided that the purchaser should be furnished with an abstract of the lease, of the assignment of the lease, and of the subsequent title, and should not make any objection in respect of the "intermediate title" between the lease and the assignment, "notwithstanding any recital of or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the said assignment vested in the assignees a good title for the residue of the term."

Subsequently to the sale the vendor's solicitor communicated to the purchaser information obtained from the mortgagor prior to the sale as to the intermediate title, and tending to throw suspicion on the vendor's title to sell at all, whereupon the purchaser took out a summons under the *Vendor and Purchaser Act*, 1874, to have it declared that the title was not such as he ought to be compelled to accept:—

Held, by the Court of Appeal (reversing *Kekewich* J.) that the condition cast upon the purchaser the burden of proving a defective title, and that, to relieve him from his contract, it was not enough for him to shew merely that the title was doubtful or open to suspicion; and, therefore, that the vendor was entitled to a declaration that a good title had been shewn "according to the terms of the contract."

Per Court of Appeal: *Semble*, a purchaser who can obtain the legal estate cannot evade his contract on the ground that he is unable to get a complete string of covenants for title.

Per Kekewich J.: Where a good title has been declared on a summons under the *Vendor and Purchaser Act*, 1874, the purchaser is not at liberty to reopen the question by way of review, unless he can prove that since the order on the summons he has discovered material facts, which he could not with reasonable diligence have discovered earlier, shewing that the title is defective; in which case he may bring an action of review, the jurisdiction of the old Court of Chancery as to allowing proceedings by way of review being still exercisable by the Chancery Division of the High

Court: but, *semble*, an action of review can now be commenced without leave.

If the vendor has brought an action for specific performance, the purchaser may bring his action of review by way of counter-claim to the vendor's action.

Form of judgment on such counter-claim.

A condition that a title for a certain period shall not be required, investigated, or objected to, is good, and can be enforced against a purchaser. Judgment of *North* J. on this point, in *Re National Provincial Bank of England and Marsh* (1) followed.

Forms of conditions restrictive of the purchaser's objections to title considered.

A mortgage of a term of years by a legal personal representative solely for his own benefit, which is bad as being a breach of trust, cannot be treated as, at all events, operating on such estate as he can pass in his character of legal personal representative.

ON the 2nd of November, 1893, Miss *Robina Scott*, the mortgagee of a leasehold house, No. 47, *Rectory Square, Mile End Road*, put up the house for sale by auction, the property being described in the particulars as "a small safe investment"; and it was stated to be let at a rent of £36 per annum, and to be "held for a term of 99 years from 25th day of March, 1865 (70½ years unexpired), at a moderate ground rent of £5 per annum."

The subject of the sale was, however, not the lease of ninety-nine years granted in 1865, but an underlease, granted in 1867, of that term except the last twenty-one days thereof.

The sale was subject to printed conditions of sale, the most material of which were the following:—

"3. The property is believed and shall be taken to be correctly described, and is sold subject to the rent, covenants, and conditions of the underlease by which the same is held, and subject also to all rights of way, water, drainage and other easements (if any) affecting the same, and to the underlease or agreement with the tenant."

Condition 5 limited the time for sending in requisitions.

"6. The purchaser shall be furnished with an abstract of the underlease, dated the 25th of June, 1867, and made between *Mark Bean* of the one part, and *Mary Ann King*, widow (since

(1) *Ante*, p. 190.

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deceased), of the other part, under which the property is held, and of an assignment of such underlease, dated the 11th day of August, 1891, and made between *John Burder Batchelor* of the one part, and *Harry Banks* and *Sarah Jane Banks*, his wife, of the other part, and the subsequent title, and shall not make any objection or requisition in respect of the intermediate title to the premises between the granting of the lease and the execution of the said assignment, notwithstanding any recital of or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the said assignment vested in the assignees a good title for the residue of the said term."

The latter part of condition 9 stated: "The vendor being a mortgagee selling under a power shall not be required to enter into any covenant or undertaking, except the usual express or statutory implied covenant that she has not incumbered, and the mortgagors shall not be required to join in any assurance for the purpose."

The day fixed for completion was the 26th of December, 1893.

The property was knocked down for £330 to *Henry Alvarez* as purchaser, who duly signed the contract and paid a deposit of £30.

The abstract, as delivered to the purchaser, commenced with the underlease of the 25th of June, 1867 (mentioned in the 6th condition), whereby the property was demised to *Mary Ann King*, widow, for the term of ninety-nine years from the 25th of March, 1865, except the last twenty-one days thereof, at the yearly rent of £5, and subject to various lessee's covenants.

The next deed in the abstract was the assignment of the 11th of August, 1891—also mentioned in the 6th condition—by *J. B. Batchelor* to *Harry Banks* and *Sarah Jane Banks*, his wife. By that assignment, after reciting the underlease, and that "by divers mesne assurances, acts in the law and events, and ultimately by virtue of a final order of foreclosure made on the 10th day of August, 1891, by Mr. Justice *Stirling* in an action in the Chancery Division of the High Court of Justice wherein the said *J. B. Batchelor* was plaintiff and the said *Harry Banks* and others were defendants, the said premises comprised in the said inden-

ture of lease had become vested in the said *J. B. Batchelor* for all the residue of the said term of 99 years (except the last 21 days thereof), subject to the rent reserved by and the covenants contained in the said lease."

The deed contained no covenants for title beyond a covenant by *Batchelor* that he had not incumbered.

The next deed abstracted was a mortgage, dated the following day, the 12th of August, 1891, by *Harry Banks* and *Sarah Jane Banks* to one *Coleman*, by demise for the residue of the term of the underlease, except the last day, to secure £200 and interest; and the next and last deed was a mortgage, dated the 15th of December, 1891, by the same mortgagors to *Robina Scott*, the vendor, for the residue of the term of the underlease, except the last day, to secure £50 and interest, but subject to the prior mortgage to *Coleman*. It was under this second mortgage that the vendor was selling.

The purchaser's solicitors made various requisitions on the title, which were replied to by the vendor's solicitor. Amongst other things, the purchaser's solicitors required that Mr. and Mrs. *Banks* should, notwithstanding the 9th condition, join in the assignment to the purchaser for the purpose of assigning the outstanding one day; and they also objected that, as the vendor would not covenant for title, the purchaser would not have a complete string of covenants for title.

While the matter was still awaiting completion, an interview took place between Mr. *Etherington*, the vendor's solicitor, and Mr. *Gilbert*, a member of the firm of solicitors acting for the purchaser. At this interview Mr. *Gilbert* asked Mr. *Etherington* certain questions relating to the intermediate title between the underlease to *Mary Ann King* and the assignment by *Batchelor* to Mr. and Mrs. *Banks*. The information then given by Mr. *Etherington* to Mr. *Gilbert* led the latter to doubt the validity of the title; and accordingly, acting on his advice, the purchaser, on the 28th of December, 1893, took out an originating summons under the *Vendor and Purchaser Act*, 1874, asking that it might be declared that the vendor, through her solicitor, having given that information with reference to the intermediate title, the title was not such as the purchaser ought to be compelled to

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accept; and for the return of the deposit and payment of the costs of investigating the title, and of the summons; or, in the alternative, that it might be declared that certain of the requisitions had not been sufficiently answered and had not been complied with, two of these requisitions being those as to getting in the outstanding one day, and the want of a string of covenants for title.

What took place at the above-mentioned interview between Mr. *Etherington* and Mr. *Gilbert* was stated in an affidavit filed by Mr. *Etherington* in opposition to the summons. He deposed that, in reply to questions as to the intermediate title, he offered to give Mr. *Gilbert* the best information in his power "as a matter of courtesy and without prejudice to the conditions of sale, and particularly the 6th condition"; and that, having made that reservation, he referred to a document in his possession as the most convenient way of giving the information, and read to Mr. *Gilbert* the following "lines" from it: "The said underlease was granted to *Mary Ann King*, the mother of the said *Sarah Jane Banks*, who died in the month of February, 1873, a widow and intestate, and having some time previously to her death, viz., in the month of January, 1868, purported to give the said leasehold premises to the said *Sarah Jane Banks*; and from that time until the 10th of August, 1891, the date of the order of foreclosure absolute, the said *Sarah Jane Banks*, or the said *Harry Banks* (to whom she was married on the 9th day of July, 1874), in her right, was in undisputed possession and enjoyment, or receipt of the rents and profits, of the said premises without having acknowledged any right or title in any other person. In the month of November, 1890, foreclosure proceedings were commenced against the said *Harry Banks* and *Sarah Jane Banks*, and one *William Lugg*, in respect of a mortgage, dated the 16th day of April, 1889 (being a mortgage to *Lugg* subsequently transferred to *Batchelor*), and a memorandum of charge, dated the 18th day of June, 1890; and the said mortgage and charge were duly foreclosed by an order of foreclosure absolute, dated the 10th of August, 1891. The said mortgage and charge respectively were signed by the said *Sarah Jane Banks* in the name of '*Mary Ann*' *Banks*; and in the said mort-

gage and in a statutory declaration of even date therewith, and in a second statutory declaration, dated the 18th of June, 1890, it was by mistake represented that the said *Sarah Jane Banks* (therein respectively called '*Mary Ann*' *Banks*) was the same person as the said *Mary Ann King* to whom the said underlease was granted; and in the said foreclosure proceedings the said *Sarah Jane Banks* was sued and entered an appearance and was foreclosed as '*Mary Ann*' *Banks*." Mr. *Etherington* then went on to depose that he was not sure whether he produced at the interview the document whereby *Mary Ann King* purported to give the premises to *Sarah Jane Banks*, but that, if he did not do so, he would have produced it if asked. The affidavit then set out the document, which was as follows:—

"I, *Mary Ann King*, of 20 *Arbour Square, Stepney*, give unto my daughter, *Sarah Jane King*, my house situated and known as No. 47 *Rectory Square, Stepney, London, Middlesex, E.*, and declare the same to be her sole property, and relinquish all my interest in the same from this date, her sisters having been provided for before.

"Witness Given under my hand.
"*Jane Allen, Shadwell.* *Mary Ann King.*
January 1, 1868."

The affidavit then proceeded as follows: "It was entirely with the view of avoiding questions which might arise upon the informality of the above document as a legal instrument, and upon the mistake made in respect of the name of the said *Sarah Jane Banks* referred to in the above-mentioned document, and the expenses consequent thereon, that the 6th condition of sale was framed, and by which I submit the purchaser is bound."

The summons came on for hearing in Court on the 3rd of March, 1894, before Mr. Justice *Kekewich*, who made an order declaring that the title was not such as the purchaser ought to be compelled to accept, and directing the vendor to return the purchaser his deposit, with interest from the date of the contract, and to pay the purchaser's costs of investigating the title and of the summons.

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From that order the vendor appealed. The appeal was heard on the 5th and 7th of May, 1894.

During the argument the vendor's counsel offered to procure the concurrence of the mortgagors in the assignment to the purchaser for the purpose of assigning the last day of the underlease.

Farwell, Q.C., and *Bissill*, for the Appellant, the vendor:—

A good title has been made according to the conditions. To enable him to get out of his contract, the purchaser must shew that the title is defective; but this the information we supplied does not shew. Mere suspicion is not enough. As to the mortgage to *Lugg* of the 16th of April, 1889, it was made by the right person though under the wrong name, and so was the memorandum of charge of the 18th of June, 1890. A person though wrongly named is bound by a decree; and if personating another in executing a deed, he is estopped from denying that he executed it: *In re Cooper* (1). But we also have a good possessory title under sect. 6 of 3 & 4 Will. 4, c. 27, the time commencing to run from the death of the intestate, *Mary Ann King*: *In re Williams* (2). We rely on the 6th condition, unless the purchaser can shew *aliunde* that we have a bad title. There has been no concealed fraud, either on the part of *Mary Ann King*, or of *Batchelor* who foreclosed. It is settled that a purchaser cannot refuse to complete on the ground of the title being merely doubtful or open to suspicion: *Alexander* v. *Mills* (3). As to the last day of the mortgage term, we are willing to get that in. As to the objection that the purchaser will not have a complete string of covenants for title, no authority is to be found in which, where a purchaser has contracted to take a covenant against incumbrances, an objection that he ought to have full covenants for title has been sustained.

Byrne, Q.C., and *Ingpen*, for the Respondent, the purchaser:—

[LINDLEY L.J.:—Why is the title not good?]

We are entitled to an abstract, supported by proper evidence,

(1) 20 Ch. D. 611, 633. (2) 34 Ch. D. 558.
(3) Law Rep. 6 Ch. 124.

of the vendor's title as disclosed to us, for the statement that was read to us shews a title of a totally different kind to that indicated in the 6th condition, and a title of so curious a nature that it cannot possibly be forced upon a purchaser. It now appears that the whole title is a complete sham. The title is made through a foreclosure which, so far as we can see, was a mere device to get rid of inquiry into what seems to have been a fraud committed by Mr. and Mrs. *Banks*. For anything we know, the mortgage of the 16th of April, 1889, and the charge of the 18th of June, 1890, may be forgeries. The assumption by Mrs. *Banks* of her mother's name is alone sufficient to suggest fraud.

[KAY L.J. :—Does not the 6th condition throw upon you the *onus* of proving that the title is bad? Under that condition you are to assume that the assignment by *Batchelor* vested a good title in the assignees. You cannot get out of this condition unless you can shew *aliunde* that there is a bad title.]

But they now affect to shew us a different title to that they have stated in their condition. "Shall assume" means, unless you find out to the contrary. The vendor having herself confessed the blot, the condition does not preclude the purchaser from inquiry: *Smith* v. *Robinson* (1).

[KAY L.J. :—Your case is suspicion, and nothing more—"I suspect that what you, the vendor, have told me in your condition is not true."

LINDLEY L.J. :—In *Smith* v. *Robinson* the defect in the title, a lease which subsequently came to light, was actually discovered: there was not merely a suspicion that the lease existed.]

This is a tricky and misleading condition intended to cover up a blot known to the vendor, and, therefore, specific performance ought not to be forced upon us: *In re Banister* (2).

[LINDLEY L.J. :—What do you say the purchaser must prove in order to get out of such a condition as this?]

For one thing, he may shew that the title is doubtful in reference to facts either appearing on the title itself, or to facts

(1) 13 Ch. D. 148. (2) 12 Ch. D. 131, 145.

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extrinsic to it: *Fry* on Specific Performance (1), and the cases there cited.

[Lindley L.J.:—But that is in the absence of a special condition.

Lopes L.J.:—It has been held in *In re Sandbach & Edmondson's Contract* (2) that a condition requiring the purchaser to assume certain facts is not misleading, if the vendor believes the facts to be true, even though the condition is intended to cover a flaw which goes to the root of the title.]

A condition of this kind is misleading if it is intended to conceal a state of circumstances known to the vendor. The vendor has destroyed the value of our contract by giving us notice of such circumstances as necessarily put us on inquiry; and it is impossible for us, on a future sale, to set up the plea of purchaser without notice.

The inability of the vendor to give us a complete string of covenants for title is also a reason why specific performance should not be forced upon us.

Lindley L.J.:—

This is an appeal from the judgment of Mr. Justice *Kekewich*.

The property is described in the particulars as leasehold, and as "a small safe investment," held for a term of ninety-nine years from the 25th of March, 1865, at a ground-rent of £5 per annum.

The conditions of sale shew that the property was held under an underlease. [His Lordship then read the 3rd and 6th conditions, and the latter part of the 9th, and proceeded:—] Now, there is nothing in these conditions which amounts to any representation of the nature of the title to be shewn. One understands from conditions of this sort that the vendor did not intend to shew his title from Mrs. *King*, the underlessee of 1867, down to *Batchelor*, who was the assignor of the 11th of August, 1891. There was some hitch or blot in that title which required the stipulation contained in the 6th condition, but the condition does not make any statement which is untrue, nor does it state

(1) 3rd Ed. p. 408.

(2) [1891] 1 Ch. 99.

what that hitch or blot is. The purchaser took the property on the terms that he would not make any objection in respect of that intermediate title. He was to take under the assignment of the underlease without tracing the title of the underlease to Mrs. *King*. That was part of the bargain. It was obvious that there was some reason or other why the purchaser should not get what is called "a good title"—something which he was entitled to ask for but would not get. The vendor's contention that the intermediate title should not be objected to is in conformity with this condition. Then some information is asked for, and the difficulty in the title is disclosed.

The story is a strange one. Between the years 1867 and 1891 there were some dealings between the daughter of *Mary Ann King* and other persons, in which the daughter passed under the name of her deceased mother. But when the matter is investigated, it appears that Mrs. *King* died in 1873, and the vendor has a title which is perfectly good, having regard to the lapse of time. Time would begin to run, under sect. 6 of the statute, 3 & 4 Will. 4, c. 27, from the death of Mrs. *King* in 1873; so that there was ample time for the acquisition of a good title by the vendor and the persons through whom she claims, and it does not appear, after all the inquiries that have been made, that the vendor has not a good title. She has a good title, though it is open to suspicion. If the purchaser could carry his case so far as to lead the Court to say that there was a misleading statement by the vendor as to title, or a desire, knowing that she had a bad title, to palm it off upon the purchaser, the purchaser might say, "You, the vendor, knew that your statement was misleading, and I am therefore entitled to be relieved from my bargain." But the purchaser wants us to go further, and beyond any authority, and he says, "Notwithstanding I entered into this condition, I want to get out of the purchase, because I do not like it." There is no reported case like that.

In re Sandbach & Edmondson's Contract (1) is in the vendor's favour. The present case illustrates an ordinary difficulty in which a vendor finds himself. He cannot explain a certain

(1) [1891] 1 Ch. 99.

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transaction, and he says to the purchaser, "You shall not inquire into it." But he also knows that he has a perfectly good title. So far as the main points go in this case, I think the vendor is right, and the purchaser, having entered into this very special bargain, is bound by it.

[His Lordship then dealt with other requisitions, observing that the vendor had now undertaken to procure the concurrence of the mortgagors in assigning the outstanding last day of the underlease, and proceeded:—]

Then the last requisition is that, as the vendor does not covenant for title, the purchaser does not acquire the benefit of a string of covenants for title. I do not think that this is a blot on the title, because, even if there were the ordinary covenants for title, the purchaser would be no better off, for the covenants would be qualified by extending only to the acts of the vendor herself. The purchaser will have a covenant against incumbrances, pursuant to the conditions. Apart from that, there is a doubt, and, in my opinion, a very considerable doubt, whether any reported decision can be found which says that a purchaser who can obtain the legal estate can get out of his purchase because he cannot get a good string of covenants.

In my opinion all the points raised by the purchaser fail. The appeal must, therefore, be allowed, with costs both here and below, and the purchaser's summons must be dismissed.

LOPES L.J.:—

There is not the slightest doubt that in this case the title is a somewhat curious one, and I can fully understand that the purchaser does not quite like it. But the sale was made subject to a very special condition, the object of which was to protect the vendor against requisitions which she could not satisfy, and objections which she could not explain away. This condition, the 6th, is a very special one, and is a condition which I should think would put one very much on one's guard; for it says that no investigation shall be made of the title between 1867 and 1891, and that the purchaser "shall assume that the said assignment (of 1891) vested in the assignees a good title for the residue of the said term." The effect of a condition of this

kind is to cast upon the purchaser the burden of proving a defective title. To enable the purchaser to escape from his contract, it is not enough for him to shew a doubtful or difficult title: he must shew more: he must shew a defective title.

The purchaser in the present case cannot shew that there is any statement that is misleading or untrue. The law is laid down clearly in *In re Sandbach & Edmondson's Contract* (1), the head-note to which is this: "A condition of sale requiring the purchaser to assume certain facts is not misleading, if the vendor believes the facts to be true, even though the condition is intended to cover a flaw which goes to the root of the title. In such a case it is not necessary to explain in the condition the specific defect in the title which the condition is intended to cover."

The judgment of the Court of Appeal, which was delivered by Lord *Halsbury*, entirely bears out that head-note. Lord *Halsbury* says, at the end of the judgment, what is perfectly true as to the effect of requiring that the condition should point out the specific objection to the title. The contention of the purchaser in the present case amounts to this—that no condition can be so framed as to protect the vendor against a doubtful or difficult title. It appears to me that such is not the law. In my opinion, the purchaser has entirely failed to make out anything like a defective title: on the contrary, the vendor has a good title under the *Statute of Limitations*; nor is there any statement made by her which is untrue. The appeal must be allowed.

KAY L.J.:—

I also differ respectfully from the conclusion of the learned Judge below, that the contract should be rescinded, and that specific performance cannot be decreed.

I will deal with the main points in this case. As I understand the argument of the purchaser's counsel, they say that, no matter what conditions there may be for the purpose of protecting the vendor from the necessity of producing evidence as to a part of the title to this estate, if the purchaser can discover

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something which, though not amounting to proof of a defective title, yet raises some doubt upon the title, he is at liberty to say, "I will not complete my contract." No authority has been cited for that proposition, and it is so remarkable that I state my strong opinion that it cannot be supported for one moment. The consequence of it would be this—that if a vendor can produce a perfectly good title, but cannot prove all the steps in it, and he then makes a careful condition precluding his being required to prove a particular step, yet, if the purchaser says he can shew that there is a doubt upon that, he cannot be ordered to perform the contract. The result of that would be what is stated by Lord *Halsbury* in *In re Sandbach & Edmondson's Contract* (1). It must frequently happen that a title cannot be proved in every step; and such a proposition as has been suggested would, in many cases, make property absolutely unsaleable, not because the vendor has a bad title, but because he has a title upon which suspicion can be cast, and because the purchaser claims the right to say that the part of the title to which the condition refers is doubtful, and, therefore, he cannot be called upon to perform the contract. That would be relieving a man from a contract for reasons that it is impossible to maintain either in law or in argument.

In this case what happened was this. The 6th condition mentions, in the first place, an underlease dated the 25th of June, 1867, and then mentions an assignment of it dated the 11th of August, 1891; and it provides that, notwithstanding any recital of or reference to such title contained in the assignment or any subsequent document of title, the purchaser shall not make any objection or requisition in respect of the intermediate title, "but shall assume that the said assignment vested in the assignees a good title for the residue of the said term." Now, it seems that the purchaser, having got a proper abstract, made certain inquiries on points which affected the intermediate title, and then the reason why this peculiar condition was inserted became immediately apparent. It was this. The underlease of 1867, and the steps by which that underlease became the property of the person by whom it was assigned in 1891,

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could not be evidenced by a proper series of deeds, and therefore this condition was put in to prevent the vendor from being compelled to produce such evidence. From 1873, when the underlessee died, the possession was in accordance with the title shewn; and, although the paper title was not complete, a perfectly good title could be given to the purchaser by possession since 1873. The purchaser does not say there is anything untrue in the statement, but he says, there being many things to raise suspicion, "I am entitled to make requisitions on the intermediate title notwithstanding this condition." If that is so, what would be the use of inserting such a condition as this? It was put in to meet this very case. I do not accede to the argument on behalf of the purchaser. He is bound by this condition, and the circumstances were such as to make it necessary to insert this condition. He cannot now say, "I am not sure, if the facts turn out to be as it is said they were, that I shall have a good title, and for that reason I refuse to complete."

I quite understand the doctrine that, even in the face of a condition like this, if the purchaser can shew there is no title at all, then, notwithstanding the condition, he can say, "I will not complete the purchase." But the purchaser in this case cannot shew that there is a bad title; he only shews that there is suspicion. If the condition had stated facts upon which the purchaser was entitled to rely, and if there had been any misstatement of those facts, and also if the condition had been misleading, then he might have said, "I am not bound by it"; but here there is no misleading statement: the facts which are stated are stated with perfect accuracy. The condition seems properly framed so as to prevent requisitions being made, and, therefore, I am of opinion that the purchaser entirely fails on this part of the case.

I concur in what has been said with regard to the minor points. The purchaser has failed to prove any reason why he should be absolved from this contract, and, therefore, in my opinion, this appeal must be allowed.

The order of the Court of Appeal (dated the 7th of May, 1894), as drawn up, directed that, upon the vendor procuring (at her

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own expense) an assignment of the last day of the underlease, and upon complying with certain other requisitions of the purchaser therein mentioned, the order of the Court below should be discharged, and in lieu thereof declared that the purchaser's requisitions had been sufficiently answered, and that a good title was shewn to the premises comprised in the contract "according to the terms of such contract"; and the order went on to direct the repayment of the deposit by the purchaser to the vendor with interest, and also the costs of investigating title which the vendor had paid to the purchaser; and the purchaser was also ordered to pay the costs of the hearing both below and on appeal.

An assignment of the premises was then executed by the vendor and all other necessary parties about or shortly before the 16th of July, 1894, and was tendered to the purchaser; but on the 19th of July, 1894, an interview took place between the solicitors to the parties, when the purchaser's solicitor told the vendor's solicitor that, in consequence of further information he had recently obtained as to the title, he did not intend to pay the balance of his purchase-money or to complete his purchase; that a will of *Mary Ann King* had been discovered, "and a huge fraud had been committed by Mrs. *Banks*." Thereupon, on the 23rd of July, 1894, the vendor issued the writ in the action, *Scott* v. *Alvarez*, claiming specific performance of the contract, and payment of the balance of the purchase-money.

On the 24th of October, 1894, the Plaintiff delivered her statement of claim, stating the order of the Court of Appeal, and (as the fact was) that she had complied with that order as to procuring an assignment of the last day of the underlease, and in other respects, and had tendered a conveyance. The Defendant then applied for, and on the 26th of November, 1894, obtained from Mr. Justice *Kekewich* in Chambers, an order, intituled in the vendor and purchaser summons and in the action, giving him leave "to bring an action of review by way of counter-claim" in the action, notwithstanding the order of the Court of Appeal on the vendor and purchaser summons, "on the ground that, since the date of the said order, the Applicant had, for the first time, discovered certain new matter material to his defence in the said action, as particularly set forth in the joint

affidavit" of himself, his solicitor, and *James Wardill*, who had married a sister (then deceased) of *Sarah Jane Banks*; and the costs of the application were ordered to be costs in the counter-claim.

This joint affidavit stated that the only information with reference to the intermediate title which the Defendant, the purchaser, or his solicitor had obtained prior to the order of the Court of Appeal, and on which the Defendant relied in support of his objection to the title, consisted of (1.) a copy of an order dated the 10th of August, 1891, made by Mr. Justice *Stirling* in an action wherein the said *J. B. Batchelor* was plaintiff, and *Harry Banks* and "*Mary Ann*," his wife, and *William Lugg* were defendants (being the foreclosure order mentioned in the abstracted deed of the 11th of August, 1891), whereby, upon the application of the plaintiff and upon hearing "the defendants *Harry Banks* and *Mary Ann* his wife in person," and upon reading certain proceedings and an exhibit (being a transfer of mortgage from the defendant *Lugg* to the plaintiff *Batchelor*, dated the 31st of March, 1891), and the parties waiving an account, and consenting to the following order, it was ordered that the defendants *Harry Banks* and "*Mary Ann*" his wife should, from thenceforth, stand foreclosed from all equity of redemption in the premises comprised in the memorandum of charge dated the 18th of June, 1890, signed by the defendants *Harry Banks* and "*Mary Ann*" *Banks* his wife, and the indenture of mortgage dated the 16th of April, 1889, and made between "*Mary Ann*" *Banks* of the first part, *Harry Banks* of the second part, and *William Lugg* of the third part; (2.) the statements contained in the document read by Mr. *Etherington* at his interview with Mr. *Gilbert*, the purchaser's solicitor; and (3.) the document of gift set out in Mr. *Etherington's* affidavit filed in opposition to the vendor and purchaser summons. The joint affidavit then went on to state that, since the date of the order of the Court of Appeal, Mr. *Gilbert* had ascertained the following further facts. *Mary Ann King*, the mother of *Sarah Jane Banks*, made her will dated the 24th of July, 1865, and thereby appointed her daughters, *Sarah Jane King* (afterwards *Banks*) and *Amelia Margery King*, her trustees and executors, and, after giving certain specific and pecuniary legacies, gave the residue

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of her estate (comprising the leasehold house in question) to them, upon trust, after the payment of her debts, funeral and testamentary expenses and legacies, to pay the income in equal proportions to her three daughters, *Sarah Jane King*, *Amelia Margery King*, and *Mary Ann Woolfe* during their respective lives, and after the death of each of her said daughters, to hold one-third of the capital in trust for her children living at her death equally; and in case of any of the said daughters dying without leaving issue, such one-third should be held in trust for the survivors of the said daughters absolutely; and in case of the death of the survivor without leaving issue, the whole of the residuary estate should be held in trust for the next of kin of the testatrix according to the statute. And the testatrix declared that the share of any female legatee should be for her sole and separate use. By a codicil of the 23rd of December, 1870, the testatrix revoked the appointment of trustees and executors, and appointed her said daughter *Sarah Jane King* sole trustee and executrix of her will.

The testatrix died on the 3rd of January, 1871, and her will and codicil were proved on the 7th of March, 1871, by the said *Sarah Jane King*, who thereupon treated the said leasehold premises as part of the estate of the testatrix, and succession duty was duly paid by each of the three daughters in respect of one-third part thereof, and the rents and profits were paid as directed by the will.

The affidavit then went on further to state that Mr. *Gilbert* had had an interview with Mrs. *Banks* in the presence of the purchaser, and that Mrs. *Banks* then admitted that she had executed the mortgage of the 16th of April, 1889, and memorandum of charge of the 18th of June, 1890, mentioned in the order of foreclosure of the 10th of August, 1891, in the name of *Mary Ann King*, and had "fraudulently represented that she was the same person as the said *Mary Ann King*, to whom the said underlease was granted, and appropriated the money raised by the said mortgage and charge to her own use. The said mortgage and memorandum of charge were, in fact, forged deeds, and invalid. The said *Sarah Ann Banks* at the same time admitted that the document of gift bearing date the 1st day of January,

1868, was a forgery; that the same was signed by her in the name of *Mary Ann King* to induce the said *Charles Etherington* to believe that she had a good possessory title to the said premises, and she also signed the name of *Jane Allen* as attesting witness, being a person who was then dead."

Then, in the same affidavit, *James Wardill*, who had married *Amelia Margery King*, a sister of *Sarah Jane Banks*, stated that, since the death of his wife in 1881, Mrs. *Banks* had paid to him, on behalf of his two children, one-third of the rents and profits of the leasehold premises until recently, when she stated her inability to make any further payments through being pressed for money; and that until the month of July, 1894, he had no knowledge that she had parted with the property, and was under the impression she still held the same and received the rents and profits thereof under the trusts of the will.

In pursuance of the order of the 26th of November, 1894, the Defendant, on the 3rd of December, 1894, delivered a defence and counter-claim in the action. In his defence he repeated the statements contained in the above-mentioned joint affidavit, as to the extent of his information acquired since the date of the order of the Court of Appeal respecting the intermediate title, including the details of the will of *Mary Ann King* and the date of her death. He then went on to state as follows:—

"The said *Sarah Jane Banks* married *Harry Banks* on the 9th of July, 1874. *Amelia Margery King*, the second daughter of *Mary Ann King*, married *James Wardill* on the 23rd of June, 1870, and died on the 16th of August, 1881, leaving her husband and two children, who were still living, and one of whom was an infant. *Mary Ann Woolfe*, the third daughter of *Mary Ann King*, died a widow on the 21st of February, 1878, leaving two children, both of whom had since died. The said *Sarah Jane Banks* paid to *Amelia Margery Wardill* during her life, and subsequently to *James Wardill*, on behalf of his two children, one-third of the rents and profits of the leasehold house in question. *Mary Ann Woolfe* resided in the house during her life at an agreed rent, and paid *Sarah Jane Banks* two-thirds of such rent, retaining the remaining one-third in respect of her share in the premises under her mother's will."

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The defence further alleged that, without the knowledge of any of the other beneficiaries under the will, *Sarah Ann Banks* fraudulently executed the mortgage of the 16th of April, 1889, and memorandum of charge of the 18th of June, 1890, mentioned in the order of foreclosure of the 10th of August, 1891, in the name of "*Mary Ann*" *Banks* for her own benefit; that the said mortgage and memorandum were, in fact, forgeries; that immediately after the execution of the memorandum the said *J. B. Batchelor*, and in February, 1891, Mr. *Etherington*, acting as solicitor for *Sarah Jane Banks*, became aware of her real name, and that she assumed the name of "*Mary Ann*" *Banks* for the purpose of representing herself to be the person to whom the underlease had been granted, and objection was taken to her title by *Batchelor* and also by Mr. *Etherington* on behalf of the Plaintiff, for whom he was then acting as solicitor in the matter of a proposed loan by the Plaintiff to *Sarah Jane Banks*; and that in consequence thereof *Sarah Jane Banks* produced the above-mentioned document of gift, and made the statement embodied in the document which Mr. *Etherington* read to Mr. *Gilbert* as above stated; and that it was then arranged that the said foreclosure order should be obtained, and that *Batchelor* should re-assign the premises to *Sarah Jane Banks* and her husband on payment to *Batchelor* of the amount found due to him in the foreclosure proceedings; also that *Sarah Jane Banks* had since admitted the document of gift to be a forgery.

The defence then alleged that Mr. *Etherington* had acted as solicitor for *Sarah Jane Banks* and her husband, and also for *Coleman* and the Plaintiff, in the matter of the mortgages of the 12th of August and the 15th of December, 1891, and that all the facts would have come to the knowledge of *Coleman* and the Plaintiff respectively if such inquiries and inspections had been made as ought reasonably to have been made by them respectively or on their behalf, and that they had respectively "constructive notice" thereof. The defence also alleged that the beneficiaries under *Mary Ann King's* will, other than *Sarah Jane Banks*, had threatened proceedings to set aside the mortgages of August and December, 1891.

The Defendant then, by his counter-claim, after referring to the order of the Court of Appeal set out in the statement of claim, and repeating by reference the allegations in the defence, and that he had obtained special leave to bring an action of review by way of counter-claim, counter-claimed (1.) that, notwithstanding the order of the Court of Appeal, it might be declared that a good title was not shewn, or that the Plaintiff's title was not such as the Defendant ought to be compelled to accept; and (2.) that the Plaintiff might be ordered to repay the deposit, with interest, and the Defendant's costs of investigating the title.

In her reply the Plaintiff insisted that the Defendant was estopped by the order of the Court of Appeal from setting up by way of defence the various facts alleged to have been ascertained by him since the date of that order; that the Defendant was precluded by the conditions of sale from now making any objection to the title; and that even if it should be held that the Defendant was entitled to set up the further facts by way of defence, and such facts were proved to be true, they disclosed no valid ground of defence. Then, by way of defence to the counter-claim, the Plaintiff relied on the order of the Court of Appeal as a bar to the counter-claim, and alleged that, if the further facts were true, which she denied, they were known to, or could by reasonable diligence have been discovered by, the Defendant prior to the order of the Court of Appeal; that prior to the execution of the mortgage of the 15th of December, 1891, all such inquiries and inspections were made as ought properly to have been made by or on behalf of the Plaintiff, and the Plaintiff denied that she had had constructive notice of the alleged further facts; that the Plaintiff had shewn a good title in accordance with the contract; and that, even if those facts were true, they shewed a good title on the part of the Plaintiff in accordance with the contract, since the property was, at the date of the mortgage of the 15th of December, 1891, vested in *Sarah Jane Banks*, who was the sole executrix of *Mary Ann King*, and as such had, with her husband's concurrence, full power to mortgage or charge the same to the Plaintiff, and to give a good receipt for the mortgage money.

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The Defendant then joined issue upon the Plaintiff's defence to the counter-claim, and the action and counter-claim came on for trial upon oral evidence on the 5th of February, 1895.

The witnesses included the solicitors to the Plaintiff and Defendant, the Defendant himself, *Wardill*, who married *Amelia Margery King*, and *Sarah Jane Banks*; but not her husband, who had disappeared. The result of the examination and cross-examination was shortly to the following effect: Mr. *Etherington*, the Plaintiff's solicitor, acted for her in the matter of the mortgage of the 15th of December, 1891, and, on investigating the title on her behalf in March of that year, found it open to such suspicion that he at that time advised his client not to advance money upon it. Subsequently, in that month he interviewed Mrs. *Banks*, who gave him the information which he subsequently embodied in the written statement, or "lines," read by him to Mr. *Gilbert*, and also handed to him the so-called document of gift of the 1st of January, 1868. This, supplemented by independent evidence of long possession by the mortgagors, satisfied him, and he subsequently advised his client to accept the mortgage. It further appeared that *Batchelor*, the plaintiff in the foreclosure action—who was a solicitor—had also entertained a doubt as to the title, and that his doubts were confirmed by the production to him by Mr. *Etherington* of the written statement and the document of gift, whereupon a foreclosure judgment was obtained by consent as above stated. It also appeared, and, as will be seen from the judgment, his Lordship was satisfied upon the point, that the true facts of the case, as stated in the joint affidavit on the purchaser's summons for review and in his defence, did not come to the knowledge either of the Plaintiff or the Defendant, or of their respective advisers, until after the order of the Court of Appeal; that prior to that date searches were made, but, of course, without avail, for a record of the death of *Mary Ann King*, on the footing of Mrs. *Banks*' statement, communicated to the purchaser's solicitor by Mr. *Etherington*, that she died at sea in 1873 intestate, and that on persistent inquiries being made of Mrs. *Banks* personally about the middle of July, 1894, by the purchaser, and also by his solicitor, whose previous suspicions had been increased by investigation, the real facts

came to light, and a copy of the will of *Mary Ann King* was then obtained from *Somerset House*. In short, the various statements in the above-mentioned joint affidavit and defence were proved at the trial, and Mrs. *Banks* herself admitted in the witness-box, either directly or by inference, that she had executed and signed in the name of her mother the mortgage of the 16th of April, 1889, the memorandum of charge of the 18th of June, 1890, the two statutory declarations of those dates, and the document of gift of the 1st of January, 1868, and she also admitted having in fact in her communications with the other beneficiaries under her mother's will always treated the house as trust property.

Warmington, Q.C., and *Bissill*, for the Plaintiff:—

Unless the Defendant, the purchaser, can prove fraud on the part of the vendor, he is bound to complete, having regard to the order of the Court of Appeal, and on that order we rely, and also on the 6th condition, as precluding the purchaser from going into the matters now in question. There is no allegation by the Defendant that the vendor has been guilty of any fraud, or has had knowledge of any fraud or concealment. The difficulty has arisen solely through Mr. *Etherington*, the vendor's solicitor, having, by courtesy and excessive candour, given the information to the purchaser's solicitor instead of relying simply on the 6th condition. Moreover, the mortgage of the 15th of December, 1891, under which we are selling, is a mortgage by Mrs. *Banks* as beneficial owner, and, therefore, under sect. 63 of the *Conveyancing and Law of Property Act*, 1881, it includes all the estate and interest of the conveying party; and that is sufficient to pass whatever that estate and interest may actually be, whether as executor or otherwise, although the conveying party may profess to convey in a different character: *Drew* v. *Earl of Norbury* (1); *In re Morgan* (2).

Again, we have a good title under sect. 6 of the *Statute of Limitations* (3 & 4 Will. 4, c. 27), for from the death of *Mary Ann King* in 1871 the person rightly described as "*Sarah Jane Banks*" has been in possession.

(1) 3 J. & Lat. 267, 284. (2) 18 Ch. D. 93.

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We had no such notice of the blot on the title as to prevent us making a good title: *Bailey* v. *Barnes* (1).

With regard to the counter-claim, there is no ground for review. A judgment cannot be upset on new evidence: *Duchess of Kingston's Case* (2).

[KEKEWICH J. referred to *Mitford* on Pleading (3) as to the circumstances in which a bill of review could have been filed under the old practice, and observed that formerly a bill of review would have stated the facts on which the relief claimed was based, whereas in the present case the counter-claim merely stated them by reference to the allegations in the defence—a course which he did not approve of, though it was allowed by the present practice.]

The Defendant does not allege any deception on the part of the Plaintiff, nor does he say that the facts alleged in his defence, and on which he bases his counter-claim, could not have been discovered by him before. After *Falcke* v. *Scottish Imperial Insurance Company* (4); Annual Practice, 1895 (5), we cannot contend that the old jurisdiction as to review has been abolished by the *Judicature Act*; but now, as formerly, the *onus* is on the party proceeding by way of review to prove that he could not, by reasonable diligence, have ascertained the new facts. That *onus* the Defendant here has not discharged, for the information given to his solicitor by Mr. *Etherington*, as stated in the latter's affidavit on the vendor and purchaser summons, was sufficient to put him on inquiry.

Renshaw, Q.C., and *Ingpen*, for the Defendant:—

That the old jurisdiction as to review remains appears also to have been laid down by Lord Justice *Cotton* in *In re May* (6).

Assuming it was necessary for us to obtain leave to review, which may be doubted under the present practice, we duly obtained it. If there is any defect in pleading in the counter-claim, that is a mere matter of amendment which may be allowed now.

(1) [1894] 1 Ch. 25.
(2) 2 Sm. L. C. 9th Ed. pp. 812, *et seq.*
(3) 5th Ed. p. 102.
(4) 35 W. R. 794.
(5) Page 544.
(6) 28 Ch. D. 516, 521.

[KEKEWICH J.:—Yes.]

With regard to our absence of knowledge of the real facts, we were put off the scent by Mr. *Etherington's* statement that *Mary Ann King* died in February, 1873, intestate, so that it could not have occurred to us to make any search at *Somerset House* prior to that year. The order of the Court of Appeal was, no doubt, right upon the facts then before the Court, but it is clearly wrong now that the true facts have come to light. We are only bound by the decision of the Court of Appeal so far as it rests upon the materials then before it, and no further. The Court went upon Mrs. *Banks* having a title as owner in possession in her own right—a title which is entirely inconsistent with her real title as executrix: she was not in possession in the sense on which the Court proceeded. In assigning the outstanding day vested in her as trustee and executrix she was clearly guilty of a breach of trust, and therefore the vendor cannot avail herself of the doctrine of *Bailey* v. *Barnes* (1). That this house is trust property has been fully proved by the evidence; so that it is not a mere question of administration by an executor. No doubt, as a general rule, when an executor is disposing of part of his testator's estate, the presumption is that he is acting in the discharge of his duty as executor; but that presumption may be rebutted by special circumstances: *In re Venn and Furze's Contract* (2): and here we have the special circumstances that all the legacies and the succession duties have been paid. It is impossible to contend that upwards of twenty years after the death of the testatrix, the underlessee, a person could convey as executor without any reference to the conveyance being made in that capacity. Mrs. *Banks*, therefore, cannot make a title as executrix, no explanation being forthcoming as to why she should be selling as such at this distance of time; and, moreover, her root of title is inconsistent with that position, for in August, 1891, she took an assignment to herself as a stranger from *Batchelor*, who was mortgagee from another person named "*Mary Ann*" *Banks* and became owner by foreclosure against that person.

As to the 6th condition, its language is not wide enough to

(1) [1894] 1 Ch. 25, 37. (2) [1894] 2 Ch. 101, 114.

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prohibit the purchaser from shewing, if he can, that the vendor has a bad title. All the Court of Appeal decided was that the condition was a sufficient protection to the vendor when the title appeared to be nothing more than doubtful.

[KEKEWICH J. referred to *In re National Provincial Bank of England and Marsh* (1), as to re-opening, in an action for specific performance, a question of title decided on a vendor and purchaser summons.]

As to the costs of the vendor and purchaser summons, we cannot claim them, having regard to *Bain* v. *Fothergill* (2).

Warmington, in reply:—

Under the order of the Court of Appeal the Plaintiff has a declaration of a good title to the term less one day, and she has therefore, on the facts, an equally good title to the one day. Accordingly, she is in the position of a purchaser without notice of any other equity. Again, the purchaser has not discharged his duty of inquiry. We rely strongly upon the fact that he made no inquiries of Mrs. *Banks* until after the order of the Court of Appeal in May, 1894. There was nothing to prevent his making those inquiries before, and, had he done so, she would no doubt have told him the facts he obtained from her without difficulty in July. It is incumbent on a person impeaching a judgment to shew that, before the judgment, he made every inquiry which would have elicited the true facts.

[KEKEWICH J.:—Does the old rule that you cannot go behind a judgment, except for cogent reasons, apply to such procedure as a vendor and purchaser summons?]

In the case of any action, it is necessary for the litigant to prove that the new matter could not have been discovered before the judgment, and still more so in the case of a vendor and purchaser summons, where the purchaser has entered into a contract subject to a restrictive condition, which from its very terms suggests that there is something doubtful about the title. *Preston Banking Company* v. *William Allsup & Sons* (3) illustrates

(1) *Ante*, p. 190. (2) Law Rep. 7 H. L. 158.
(3) *Ante*, p. 141.

the jealousy of the Court in preserving its own judgments. The terms of the 6th condition are sufficient to preclude the purchaser from questioning the vendor's title: *In re National Provincial Bank of England and Marsh* (1).

As to the costs of the action, the Plaintiff has discharged her duty, and is supported by the order of the Court of Appeal, and should not, therefore, be ordered to pay them.

Cur. adv. vult.

1895. March 2. Kekewich J.:—

If such remarks as it occurs to me to make run to an inordinate length, prolixity must be set down to an anxious wish fully to deal with a strange case bristling with points of some novelty, interest, and importance.

It is, of course, impossible to treat the Plaintiff's action independently of the Defendant's counter-claim, or of the circumstances under which that counter-claim is made. Yet, for some purposes and to some extent, it is necessary to attempt this. The Plaintiff insists on the order of the Court of Appeal declaring that the purchaser's requisitions had been sufficiently answered, and that a good title was shewn to the premises comprised in the contract, according to the terms of such contract. I cannot but think that, if there were no counter-claim, this contention would prevail. It may be that the *Vendor and Purchaser Act*, 1874, was not intended to provide a summary solution of other than simple questions, or that the practice of the Court has sometimes overstepped the limits of prudence in deciding on a summons points which might with advantage be left to be raised by action, and determined after issue joined and evidence adduced; but it certainly has been the practice of the Court to determine on summons under the Act any question of title arising between vendor and purchaser, and to declare that a good title has or has not been made. There are undoubtedly many advantages attaching to this practice, and it would, in my judgment, be a serious detraction from them to hold that, when a good title has been declared on a vendor and

(1) *Ante*, p. 190.

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purchaser summons, the purchaser is at liberty to reopen the question thus concluded in defence to an action for specific performance. I say this with the knowledge that, in a recent case to which I must presently refer on another point, *In re National Provincial Bank of England and Marsh* (1), Mr. Justice *North* made a suggestion in a contrary direction. It was only a suggestion, and, therefore, I am not differing from an opinion of his; but, because of the suggestion, I thought it right that my own opinion should be clearly expressed.

The order of the Court of Appeal provided that the Plaintiff should procure an assignment of the last day of the underlease, and the declaration of good title was made conditionally on this being done. It has been done. The purchaser, however, contends, that it now appears that such an assignment is improper, and that he cannot be required to accept it, seeing that it is now proved that *Sarah Ann Banks* was a trustee of her mother's will, and that to assign this day would be a breach of trust. Whether, apart from the order of the Court of Appeal, such an assignment ought to be made or not, I do not now decide; but the effect of the order is, I think, to preclude the purchaser from raising that question. For the present purpose I must assume that the order stands, and that the title is good; and I think that the Court of Appeal must be taken to have intended that the assignment was to be made by those who would be the proper parties on that footing.

Therefore, if the Defendant can now successfully resist the Plaintiff's action for specific performance, it must be on the ground that he is entitled to review the order of the Court of Appeal. He has obtained leave to do this, and the counter-claim depends on it. It is not stated in the counter-claim, but in fact the order of the 26th of November, 1894, granted leave on the express ground that, since the date of the order of the Court of Appeal, the Defendant had for the first time discovered certain new matter material to his defence in this action. Even that is not quite accurate, because, according to the old rule—see *Mitford* on Pleading (2), and, as an illustrative and instructive case, *Hosking* v. *Terry* (3)—such leave ought only to

(1) *Ante*, p. 190. (2) 5th Ed. p. 102. (3) 15 Moo. P. C. 493.

be granted upon allegations on oath that the new matter could not be produced or used by the party claiming the benefit of it at the time when the decree intended to be reviewed was made. Assuming that the evidence in support of the application for leave to review reached the required point (which it must be taken to have done), I apprehend that the leave was properly granted; and if it turns out that the evidence at the trial also meets the exigencies of the rule, I apprehend that the order of the Court of Appeal may still be reviewed, notwithstanding that the Court of Chancery no longer exists, and that the jurisdiction is exercised in the Chancery Division of the High Court. Mr. *Warmington* admitted that, having regard to the case of *Falcke* v. *Scottish Imperial Insurance Company* (1), decided by Mr. Justice *Kay* on the 8th of August, 1887, he could not here argue to the contrary. If the question is to be reopened, it must be before a higher tribunal. It may, however, be worth while to mention that I do not regard the case of *Boswell* v. *Coaks* (2) as at all condemnatory of actions of review, though possibly an authority that they may now be commenced without leave.

The strength of the Defendant's case lies in the discovery that *Mary Ann King*, the original underlessee of the premises, made a will, of which her daughter *Sarah Ann Banks* was executor and trustee. That this discovery was actually made after the order of the Court of Appeal is beyond doubt; but the Plaintiff contends that it might with reasonable diligence have been made before. The title was one suggestive of difficulty from first to last. Mr. *Etherington* has told us in the witness-box his hesitation to advise his client to advance money on it, and the doubts of the advisers of the Defendant are sufficiently evidenced by the course which they adopted. With suspicion thoroughly aroused, ought they not to have inquired more narrowly into the title intervening between the original underlease and the assignment of the 11th of August, 1891, and this notwithstanding the prohibition, whatever may be its meaning or value, contained in the 6th condition of sale? The case against the purchaser may be stated even more strongly than that, because some inquiry was made, and on the application under the *Vendor and*

(1) 35 W. R. 794. (2) 6 R. 167.

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Purchaser Act, Mr. *Etherington* made an affidavit giving information which apparently had satisfied him, but which was certainly enough to raise suspicion, to say nothing of not allaying suspicion already awakened. But in one of the documents set out in that affidavit and referred to in the proceedings as "the lines," it was stated that *Mary Ann King* died in the month of February, 1873, a widow and intestate; and it seems that in conversation Mr. *Etherington* affirmed her intestacy, and further mentioned that she had died at sea. Some search was apparently made for a record of her death in 1873 and subsequently; but it did not occur to any one to search in previous years, and I cannot regard the omission as culpable. When at length, after the order of the Court of Appeal, and in pursuance of increased suspicion and further information, search was made in 1871, it was at once found that *Mary Ann King* died in that year leaving a will, of which without further difficulty a copy was obtained. The history of the case from that point turns on the discovery thus made, and on the discovery and the consequences of it the Defendant's claim to relief depends. In my opinion, the discovery could not with reasonable diligence have been made earlier, and I must now consider how it affects the title.

In pursuing this inquiry it is impossible not to mention some things reflecting on Mrs. *Banks*' conduct; but I desire, and it is possible, to avoid graver charges. She was the sole executor and trustee of her mother's will, and under that will she was trustee for herself and her two sisters, and their respective children. Except to pay debts and the costs of administration, she had no right to dispose of the property by sale or mortgage, and there is no suggestion of money having been required for these purposes. It is proved that she treated her sisters and their children as legatees under the will, and the house in question was for many years dealt with as trust property. Notwithstanding this, on the 16th of April, 1889, in concurrence with her husband, but assuming the name "*Mary Ann,*" and professing to be her deceased mother the original underlessee, Mrs. *Banks* mortgaged the house to *William Lugg,* and it is directly through this mortgage that the Plaintiff claims. It was in 1891 transferred to *J. B. Batchelor,* who obtained a foreclosure judgment

by consent, under an agreement to reassign the property to Mr. and Mrs. *Banks*, by whom it was again mortgaged, first, to *Coleman*, and, secondly, to Miss *Scott*, the Plaintiff and vendor. Unless this title can be supported on the ground that Mrs. *Banks* mortgaged the property in the first instance as legal personal representative of the original underlessee *Mary Ann King*, it is bad as depending on a breach of trust—that is, a disposition for her own benefit of what she held in her character of trustee. It is argued that, notwithstanding that the mortgage to *Lugg* was made by Mrs. *Banks* for her own benefit, about which there is no room for doubt, yet, inasmuch as she was in fact the legal personal representative of Mrs. *King*, the deed must be taken to operate on such estate as she could pass in that character, and reference was made to *Lord St. Leonards'* decision in *Drew* v. *Earl of Norbury* (1). To apply the doctrine there stated to a case like the present would be to use it to contradict the intention of the parties, and to make it serve a purpose inconsistent with the established facts. Can that be right?

At any rate, this consideration takes the case out of *In re Venn and Furze's Contract* (2), in which Mr. Justice *Stirling* (3) limits the presumption that an executor is acting in the discharge of the duties imposed on him as executor by the phrase "unless there is something in the transaction which shews the contrary."

But, at best, the deed of 1889 was only a mortgage, and the equity of redemption remained in Mrs. *Banks* as trustee of Mrs. *King's* will. She could not deal with that equity of redemption as her own property; and, even assuming that the first mortgage could be supported on the above ground, the transactions of 1891, which cannot in anywise be referred to her representative character, are open to the objection of breach of her duty as trustee.

Then it is said that the vendor had no notice of this blot on the title, and reference was made to *Bailey* v. *Barnes* (4) as an authority that she can nevertheless make a good title to a purchaser. This is not a case of an outstanding incumbrance which

(1) 3 J. & Lat. 267, 284.
(2) [1894] 2 Ch. 101.
(3) [1894] 2 Ch. 114.
(4) [1894] 1 Ch. 25.

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can be held not to prevail against a person getting in the legal estate; it is in fact a leasehold title, every step of which is necessarily within the purchaser's cognizance notwithstanding that all the intervening assignments have not in fact been investigated. The doctrine relied on can have no application to such circumstances.

My conclusion as regards all these points is that, on the materials now disclosed, the vendor has not made a good title, and that the Defendant ought to be relieved from his purchase.

But it is urged that the 6th condition of sale precludes the Defendant from insisting on any of these objections. I take it that a vendor can by apt words bind a purchaser to accept such title as the vendor can give him, even though it turn out that the vendor has no title at all, or can preclude him from making objections of a certain character or to a certain part of the title. Observe, that I am necessarily speaking only of vendors competent to sell on what terms they please, and am not in any way adverting to conditions open to criticism as being depreciatory, or such as otherwise ought not to be made by persons occupying a fiduciary character. The authorities have been reviewed by Mr. Justice *North* in the recent case already cited, *In re National Provincial Bank of England and Marsh* (1), and I entirely concur with that learned Judge's conclusion that a condition that a title for a certain period shall not be required, investigated, or objected to is perfectly good, and can be enforced against a purchaser.

There have of late years been many modifications of conditions of this character, and it is not uncommon now to see a condition to the effect that the purchaser shall not be at liberty to make objection on the ground of notice of defects derived from any source or discovered by means other than the investigation of the abstracted documents.

The 6th condition does not go this length, nor is it framed in the simple language adopted in the case before Mr. Justice *North*. It says that the purchaser shall not make any objection or requisition in respect of the intermediate title to the premises between the granting of the lease and the execution of the

(1) *Ante*, p. 190.

assignment by *Batchelor*, "notwithstanding any recital of or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the said assignment vested in the assignees a good title for the residue of the said term." The weakness of this condition lies in the word "notwithstanding," and the sentence depending on it. It seems to me distinctly to leave it open to the purchaser to make objections or requisitions in respect of the intermediate title, provided they are based on knowledge derived from sources other than the assignment or any subsequent document of title. It may be said that, if the purchaser does this, he fails to assume that the said assignment vested in the assignees a good title for the residue of the term; but this would, in my judgment, be giving too large a meaning to the word "assume." I think it means that the purchaser must make this conclusion from the assignment and subsequent documents without proof or cavil, and not that he is bound to treat as true what from other sources he knows to be false.

This last argument of the vendor, therefore, in my opinion, also fails, and I hold the Defendant entitled to the relief asked by the counter-claim. I propose to pronounce a judgment to the following effect:—

The Court being satisfied that the further evidence now adduced was not known to the Defendant at the date of the order of the Court of Appeal, and that he could not have then acquired a knowledge thereof by the use of reasonable diligence, declare that the order of the Court of Appeal is not binding on the Defendant, and that the Defendant is not bound to accept the title to the leasehold premises in the pleadings mentioned. Dismiss the Plaintiff's action. Order return of the deposit £30, with interest at 4 per cent. from the 2nd of November, 1893, until payment; also costs of and incidental to investigation of the Plaintiff's title, which, according to *Bain* v. *Fothergill* (1), the Defendant recovers in the nature of damages.

It remains to deal with the costs. Mr. *Renshaw* did not ask me to make the Plaintiff pay the costs of the vendor and purchaser summons, or even to make her return those which by

(1) Law Rep. 7 H. L. 158.

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the order of the Court of Appeal were directed to be paid by the Defendant. He thought an order of that kind might transgress the rule of *Bain* v. *Fothergill* (1), and of course I accept his prudent conclusion without further consideration.

The costs of the application for leave to review the order of the Court of Appeal were expressly made costs in the counter-claim, and I have therefore to deal only with these latter costs and the costs of action. About the costs of the counter-claim I have no hesitation. If my conclusions are correct, the Defendant was not to blame for not having earlier brought forward the objections to the title which have now been held successful; and it would be hard to deprive the Defendant of the costs of industry and perseverance under difficulties for which he was in nowise responsible. The Plaintiff must pay these costs.

The costs of action stand on a different footing. The Plaintiff had behind her the order of the Court of Appeal, depending on a possessory title which, though displaced by facts subsequently discovered, she might reasonably expect to enforce; and she, as well as the Defendant, is an innocent party who must unfortunately suffer for the conduct of others. I think that justice will be done by dismissing the action without costs.

Solicitor for Plaintiff: *C. Etherington.*
Solicitors for Defendant: *Rodgers & Co.*

(1) Law Rep. 7 H. L. 158.

G. I. F. C.

COUNTY OF GLOUCESTER BANK *v.* RUDRY MERTHYR STEAM AND HOUSE COAL COLLIERY COMPANY.

C. A. 1895 March 4, 5.

[1895 C. 111.]

Mortgage—Colliery—Implied Transfer of Business—Mortgagee in Possession—Manager and Receiver—Validity of Deed irregularly executed.

A colliery company executed a mortgage to a banking company by sub-demise of their lands, mines, and seams of coal and other premises comprised in certain leases, and also their buildings and some of their fixed machinery. Default having been made of principal and interest, the bank took possession of the mines and appointed a receiver of the income, but did not work the mines. They afterwards brought a foreclosure action against the colliery company, and moved for a receiver and manager of the colliery :—

Held (reversing the decision of *North* J.), (1.) that although the business of the colliery was not expressly mentioned in the mortgage deed, it was intended to pass and did pass to the mortgagees, and that they were entitled to apply in the action for a receiver and manager of the colliery; (2.) that the Court would, in the exercise of its discretion, appoint a receiver and manager, although the mortgagees had taken possession and appointed a receiver of the income.

Whitley v. *Challis* (1) distinguished.

The directors of a joint stock company had power under their articles to fix the number of directors which should form a quorum. By a resolution they fixed three as a quorum. A meeting of directors, at which two only were present, authorized the secretary to affix the company's seal to a mortgage, which was accordingly done by the secretary in the presence of the same two directors :—

Held, that as between the company and the mortgagees, who had no notice of the irregularity, the execution of the deed was valid.

Royal British Bank v. *Turquand* (2) and *Mahony* v. *East Holyford Mining Company* (3) followed.

THIS was an action for foreclosure by the bank against the colliery company and certain second mortgagees.

The *Rudry Merthyr Steam and House Coal Colliery Company*, being largely indebted to the *County of Gloucester Bank*, executed a mortgage, dated the 14th of March, 1892, whereby the colliery company demised to the bank all the pieces or parcels of land, mines, beds and seams of coal and other the premises comprised

(1) [1892] 1 Ch. 64. (2) 6 E. & B. 327.
(3) Law Rep. 7 H. L. 869.

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in and demised by certain indentures of lease therein mentioned, and also all buildings and erections, fixed motive powers, and fixed powers of machinery erected or being on the said premises, except such machinery as would be deemed personal chattels within the *Bills of Sale Acts*, 1878 and 1882, and except also such erections and buildings and machinery (if any) as were reserved by any of the said leases, for the residue of the several terms granted by the said leases except the last three days of each lease, by way of mortgage for securing the repayment of £6000 with interest to the bank. The deed made no mention of the business or goodwill of the colliery.

The deed of mortgage was duly executed by the company, the seal of the company being affixed by the secretary. In fact, however, by virtue of the articles of association of the company, the directors were empowered to fix the number of directors who should form a quorum; and the directors had made a regulation that a quorum of three directors should be necessary for the validity of their acts. And at the meetings of the 2nd of March, 1892, at which the mortgage was sanctioned, and of the 16th of March, at which the secretary was authorized to affix the seal of the company to the deed, only two directors were present.

Default was made in payment of the mortgage debt, and on the 9th of October, 1894, the bank took possession of the colliery, and on the 27th of December, 1894, they executed a deed appointing a receiver of the income of the property under the 19th section of the *Conveyancing Act*, 1881. The bank did not work the mines, but kept the water pumped out to preserve them from injury.

The Plaintiffs moved before Mr. Justice *North* for the appointment of a manager and receiver of the colliery. The motion was opposed by the second mortgagees. His Lordship was of opinion that the business of the colliery and the right to work the mines were not included in the Plaintiffs' security, and that he was therefore precluded by the authority of *Whitley* v. *Challis* (1) from appointing a manager of the colliery. And he also considered that if no manager was appointed no good object would

(1) [1892] 1 Ch. 64.

be gained by appointing a receiver of the income, the Plaintiffs being themselves in possession, and having power to do what was necessary to preserve the property by pumping or otherwise. He, therefore, refused the application.

From this judgment the Plaintiffs appealed, leave to appeal having been given by the learned Judge.

Swinfen Eady, Q.C., and *A. à B. Terrell*, for the Appellants:—

The mortgage deed conferred the right to work the colliery. It is true that the word "business" is not used, but the fixed machinery is conveyed as well as the veins of coal, and the right to work the colliery is included by necessary implication. The coal would be of no use to the mortgagees unless they had power to work it, and for this reason it differs from *Whitley* v. *Challis* (1), where there was no such necessary implication. But the Court has power to appoint a manager of the colliery even though the business is not included in the mortgage: *Campbell* v. *Lloyd's, Barnett's, and Bosanquet's Bank* (2).

The mortgagees may carry on business for themselves on the premises, though they may not have authority to carry on the mortgagors' business. In that case they would be charged with an occupation rent. It is for the benefit of all parties that the mine should be worked; if that is not done it will be ruined.

With respect to the objection, which is now for the first time taken, that the mortgage deed was not duly executed, not having been sanctioned by a quorum of the directors, the seal of the company was affixed by the secretary, and the mortgagees were entitled to assume that he was duly authorized to affix it.

J. G. Wood, for the second mortgagees:—

The colliery business was not included in the mortgage. Only a part of the machinery was assigned, and none of the movable plant, without which the mines could not be worked. There was, therefore, no implication that it was intended to include the right to work the colliery. *Campbell* v. *Lloyd's, Barnett's, and Bosanquet's Bank* is strictly in point. The mortgagees have taken possession at their own risk. The receiver they have

(1) [1892] 1 Ch. 64. (2) [1891] 1 Ch. 136, n.; 58 L. J. (Ch.) 424.

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appointed is the agent of the mortgagors, and they cannot alter the position of the mortgagors by getting the Court to appoint a receiver and manager in the action: *In re Prytherch* (1).

The mortgage deed was not duly executed. Its execution was never sanctioned by a meeting of the directors at which a quorum was present. Therefore, the secretary had no authority to affix the seal: *D'Arcy* v. *Tamar, Kit Hill, and Callington Railway Company* (2); for he had no power to do so except in conformity with the regulations of the company.

[LORD HALSBURY referred to *Mahony* v. *East Holyford Mining Company* (3)]

M. L. Romer, for third mortgagees.

LORD HALSBURY:—

Upon the point that has been argued last, but which stands first in order, namely, whether this was a valid mortgage or not, I am of opinion that nothing has been urged before us which would induce us to hold that the authority of the company was not given to the making of this mortgage; at least in this sense, that an outside person, who had no other means of knowledge, was entitled to regard the company as having performed its functions in the making of this mortgage by whatever means it could lawfully do so. The case relied on by the Respondents—*D'Arcy* v. *Tamar, Kit Hill, and Callington Railway Company*—was a case in which a bond given by a company was held not to be the bond of the company, for this, among other reasons, that, by a section in the company's special Act, the business of the company was to be conducted by directors and by a particular quorum prescribed by the special Act, and it was held that all persons dealing with the company were bound, therefore, to know what was in the provisions of the special Act in respect to that matter. If that case were identical in its facts with the case now before us, we should be bound by that decision; but I think the facts are not the same at all. Looking at the decision in *Royal British Bank* v. *Turquand* (4), and the case in the House of Lords,

(1) 42 Ch. D. 590.
(2) Law Rep. 2 Ex. 158.
(3) Law Rep. 7 H. L. 869.
(4) 6 E. & B. 327.

Mahony v. *East Holyford Mining Company* (1), they affirm a proposition of a very different character. Persons dealing with joint stock companies are bound to look at what one may call the outside position of the company—that is to say, they must see that the acts which the company is purporting to do are acts within the general authority of the company, and if those public documents, which everyone has a right to refer to, disclose an infirmity in their action, they take the consequences of dealing with a joint stock company which has apparently exceeded its authority. But the case here is exactly the other way. All the public documents with which an outside person would be acquainted in dealing with the company would only shew this, that by some regulations of their own, what Lord *Hatherley* described as their indoor management, they were capable if they had thought right of making any quorum they pleased; and an outside person knowing that, and not knowing the internal regulation, when he found a document sealed with the common seal of the company and attested and signed by two of the directors and the secretary, was entitled to assume that that was the mode in which the company was authorized to execute an instrument of that description. It turns out that their own internal regulation was that the number of directors should exceed two. But that is a matter which was known to them and to them alone. The only external fact with respect to the management of the company of which an outside person would be cognisant would be that they had power to make any quorum they pleased, and I think he would be entitled to assume that the proper quorum had been properly summoned, and had attended, to effect the completion of that instrument. That disposes of the first point as to the validity of the mortgage.

As to the second, which I may call really the substantial part of this case, it altogether depends upon what is involved in a mortgage of colliery leases. It does not appear to be denied that, subject to a question which I will deal with presently as to whether the present Applicants have put themselves in a worse position by taking possession under their mortgage, if the business was conveyed and was intended to be conveyed by the

(1) Law Rep. 7 H. L. 869.

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mortgage deed, this was a proper and usual application, and one which would, as a matter of course, be granted. The management of the colliery business, if that was conveyed, was one which essentially required the appointment of a manager, and it would be proper and usual to come to the Court to aid the persons who were invoking its assistance for the purpose of carrying on the business. But there are two objections made. It is said first, that the business is not intended to be conveyed, and it is only a naked mortgage of a certain quantity of land and seams of coal. That appears to me to rest entirely on a false foundation. It may be that the deed does not contain the words "the colliery and the colliery business," and I assume it does not; but it is impossible to disregard the nature of the thing itself. What is a colliery? What are the seams of coal? What is the motive power? What does all that mean but that industrial occupation which we compendiously call a colliery? And what is the meaning of the conveyance but the transfer of those rights of taking away the coal and of working the coal which are involved in the leases? More than that, there is the right of the lessors to terminate all interest in these things if the coal is not properly, continuously, and uninterruptedly worked, and worked according to the best manner of working in the district in which mining goes on. It appears to me that, when one looks at the nature of the thing itself it is impossible to doubt that what was intended by the instrument and by the parties executing it was that what we, as I say, compendiously call "the colliery" was to be transferred together with the right of managing the business. If I am right in my construction of what the transfer of a colliery means, then this case is covered distinctly by authority and by authority which Mr. *Wood* does not seem to contest. That, therefore, to my mind, disposes of that question, as I am very clearly of opinion that a colliery means a business, and the conveying of colliery leases under these circumstances includes and implies in its terms the business which is carried on by the colliery.

But then there is this further question. It is said the parties cannot now make this application, because they have put themselves in the wrong by taking possession, and if they have exer-

cised their power to take possession, they cannot apply to the Court to appoint a manager, because if they choose to manage they can manage themselves. I do not deny the difficulty, and it is possible that they ought to have made this application before they had themselves taken possession. But that is not an objection at law: it is an objection only of discretion; and if we see that they have got into a difficulty by doing that which was, perhaps, ill-advised, but that it is for the advantage of all the parties that we should appoint a manager and a receiver, there is no case, as Mr. *Wood* candidly admitted, which could stop us doing so. In the exercise of our discretion we should not interfere under ordinary circumstances if the parties themselves had taken possession. But it appears to me that the circumstances of this case are extremely peculiar, and that we ought to cure the mistake that the parties have made if we can, and to put them in a position which will be to the advantage of all the parties, and which will prevent the subject-matter of this security being forfeited, as it probably would be if we were to hold our hands.

I am therefore of opinion that this appeal ought to succeed, and that Mr. Justice *North* ought to have made the order that was requested.

LINDLEY L.J.:—

I am of the same opinion. As to the question of the validity of the mortgage, which was the point raised before us and not before Mr. Justice *North*, I have not the slightest doubt that the mortgage is perfectly good upon the evidence as it stands. Mr. *Wood* has relied upon the case of *D'Arcy* v. *Tamar, Kit Hill, and Callington Railway Company* (1), which is always referred to when there has been any irregularity in affixing the seal of the company. But that case does not reach this by a very long way. The Court of Exchequer there held, in an action on a bond and a plea of *non est factum*, that they could not say that a bond executed under the seal of the company was good, because there were two Acts of Parliament—one a very special one—which rendered it absolutely essential that in the case of any bond

(1) Law Rep. 2 Ex. 158.

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issued by the company there should be a quorum of directors present at that particular meeting, and there was no such quorum and no such meeting; and therefore the Court came to the conclusion that, upon the true construction of those Acts, *non est factum* was a good defence. That case has never been applied, that I know of, to those registered companies where the quorum depends entirely upon the regulations which the directors may choose to make themselves. The case is governed, not by *D'Arcy* v. *Tamar, Kit Hill, and Callington Railway Company* (1), but by *Royal British Bank* v. *Turquand* (2), followed as it has been by a string of cases too numerous to refer to, the principal one being the Irish case, *Mahony* v. *East Holyford Mining Company* (3), to which Lord *Halsbury* has referred. Here the directors may make any quorum they like—it may be two, or it may be three. They did apparently appoint three. The mortgage in question is under the seal of the company, signed by two directors, and countersigned by the secretary. Now, what could anybody think of that? What is there to put them upon inquiry? What is there to give them notice of anything irregular, if there was anything irregular? If a person looked at the deed and looked at the articles he would not see anything irregular at all; he would be at liberty to infer, and any one in the ordinary course of business would infer, that if the directors had appointed a quorum they appointed the two who signed that deed. But supposing that three were wanted, he is not bound to go and look at the directors' minutes; he has no right to look at them except as a matter of bargain. The directors' minutes, unless he knows what they are, do not affect him at all. There is nothing irregular on the face of the deed even taken with the articles—there is nothing illegal in it. As to a plea of *non est factum*, that could not be sustained for a moment, and I have not the slightest doubt myself that that deed is as good as any deed that ever was sealed.

Now, as to the other point, that is an important matter. Mr. Justice *North* has declined to appoint a receiver and manager in this case, because he says the first mortgagees who ask for a

(1) Law Rep. 2 Ex. 158. (2) 6 E. & B. 327.
(3) Law Rep. 7 H. L. 869.

receiver and manager are not mortgagees of the business of the colliery. In one sense that is true—that is to say, they are not mortgagees of the business in so many words. But what is a colliery? what does it mean? This colliery was granted by a lease to the mortgagors, and that lease contained powers to win and get the coal, and it was the lease of a colliery to be worked; that is to say, the lessees were to dig out the coal and sell it—take so much of the ground away and dispose of it for money. There were royalties to be paid and there were clauses for re-entry, and as to dead rent and so on. The colliery was sub-let to the mortgagees. What does that mean? What is the sub-lessee to do with such property as that? It is perfectly familiar that for a great number of years property in a colliery has not been regarded simply as property in so much land. Ever since the days of Lord *Eldon*, and probably long before, there was a distinction drawn between colliery property and ordinary landed property, and in *Jefferys* v. *Smith* (1), which is one of the leading cases on this point, the Lord Chancellor makes some important observations upon this difference. It was there a question with regard to a receiver. There were some tenants in common of a colliery; one tenant in common wanted a receiver of the colliery appointed, and it was familiar law that if one tenant in common wanted a receiver of property held in common he could not get one. He must go and enter, and the law allowed all tenants in common to enter into possession. What does Lord *Eldon* say about this? He says: "The question is, whether mines have not been always considered, not altogether, but in some sort, as a species of trade. How it may be in *Wales*, I don't know; but in my country, where there are frequently twenty owners of the same mine, if each is to have a set of miners going down the shaft to work his twentieth part, it would be impossible to continue working the mine: must not a contract be implied, that it was to be carried on in a practicable and feasible way? I believe I have a note of a case before Lord *Hardwicke*, which confirms me in the idea, that where there are part-owners of a mine, and they cannot by contract agree to appoint a manager, this Court will manage it for them." That

(1) 1 Jac. & W. 298, 302.

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doctrine never applied to tenants in common of ordinary land, and the reason of it is obvious when you come to think of it. Let us see what in effect is the mortgage of this colliery. It is intended of course as a security; that is the object of the whole transaction. What are the mortgagees to do? Are they to prevent anybody going into it? Are they to leave the mortgagors alone whether they pay the interest or not, or whether they make default or not? If they go into possession of the mine what are they to do with it? Bear in mind that if they do nothing the mine will be swamped with water, and the property will not be to them what it was intended to be, namely, a security for repayment of their money. It is absolutely essential that a sub-lessee of a going concern like this is to be at liberty to dig and work the coal and sell it, and reduce what is due to him on his mortgage—that is a necessary part of the transaction. It has been so treated in almost every case of this kind which has come before the Courts. It was so treated in *Campbell* v. *Lloyd's, Barnett's, and Bosanquet's Bank* (1). That case was substantially like this; I may say exactly like this, except that in that case the sub-lease included the loose plant and materials which this sub-lease does not. That does not alter the real substantial character of the transaction, and it would be a mere mockery to a mortgagee of a colliery, whether by assignment or a sub-lease, to tell him he is not to touch the minerals.

Now it appears to me that this is a case in which I will not say there is a transfer of the goodwill, but in which it is absolutely essential to the mortgagees' security that the mine should be worked. If not it may be forfeited at any moment, and if the mortgagees had not embarrassed themselves by taking possession I should have thought that under sect. 25, sub-sect. 8, of the *Judicature Act* of 1873 it would be almost a matter of course to appoint a receiver and manager. I say under that section, because before that I rather think the first mortgagee was told to go and enter. That practice has been altered, it may be beneficially, by sect. 25 of the *Judicature Act*. The mortgagees have entered, and of course they find themselves in a difficulty; they find they have made a false move; they have got them-

(1) [1891] 1 Ch. 136, n.

selves into a state of embarrassment by entering into possession because the second mortgagees attack them, and they say, "If you are going to be mortgagees in possession you have no right to work the mine; if you work it, you must do so at your own peril; you must lay out a great deal of money in keeping the mine going and then be disallowed it on account." Of course that is very awkward, and the first mortgagees want to know what their position is. It appears to me that there being ample jurisdiction we ought not to abstain from assisting them simply because they have made what now appears to be a false step and have taken possession. Their mortgagors are being wound up and will not have anything to do with the mine, and the third mortgagees support them. The second mortgagees, finding that the first mortgagees having taken possession have got into a difficulty, want to keep them there. I do not think that is fair. I think the case for a receiver and manager is amply made out, and that the order ought to be discharged and the receiver and manager appointed.

A. L. SMITH L.J.:—

In and about the month of March, 1892, the Defendant company had overdrawn their account with the Plaintiff company to the amount of over £9000. The Plaintiffs wanted security for that overdraft, and on the 14th of March a mortgage was given by the Defendants to the Plaintiffs to secure £6000 of the £9000 then overdrawn. The first question that arises is, what was the security which was then given by the Defendants to the Plaintiffs. Was it a mere security of bare land—was it a mere security of a seam of coal—or was it the security which they had themselves to dispose of, namely, the value of the leases and the leases themselves which they held from the Marquis of *Bute*? Apart from the phraseology of this mortgage deed I cannot have any doubt myself that the intention of the parties was, that one should convey to the other by way of security the property which the one had to grant, namely, the leases which were subject to the condition that unless the seams of coal were worked the lessor might enter into possession. I do not doubt that the subject-matter of security in this case is not the bare land, but

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that it is the coal together with the rights which the mortgagors had of working those seams under their leases. If these were not granted under this mortgage deed I do not see what security the Plaintiffs took; for if they did not work it might well be and probably would be that the landlord would re-enter for a forfeiture, and the whole of the security would be gone, and the lease would be put an end to by that re-entry. I think that is the true meaning of this colliery lease. It is entirely unlike the case of *Whitley* v. *Challis* (1) which Mr. Justice *North* thought himself bound by. It is a different thing altogether from the mortgage of a house or an hotel. In that case this Court held that the business and goodwill of the hotel was not comprised in the security; and that being so, it held that the mortgagee could not enlarge his security, and they refused to order a receiver or manager to be appointed. For these reasons I am of opinion that the subject-matter of the security in this case is the colliery, and the right to work it as contended for by the Plaintiffs.

If the matter had rested there, and nothing had taken place except that on the 10th of January, 1895, this originating summons had been taken out by the Plaintiffs for foreclosure of their mortgage and sale, I suppose that under the 25th section of the *Judicature Act* it would have been held by any Court that it was just and convenient that a receiver and manager should be appointed. But it is said that something did occur between the granting of a mortgage in March, 1892, and January, 1895, namely, that the Plaintiffs, that is the *County of Gloucester Bank*, in October, 1894, entered into possession, and that therefore they are not entitled to ask for a receiver. For reasons which have been given by Lord *Halsbury* and Lord Justice *Lindley*, the mere fact of their having entered into possession as they did does not in my judgment render it unjust or inconvenient in this case that a receiver and manager should be appointed.

There is one other point about the mortgage deed not having been duly executed so as to be binding upon the Defendant company. I have nothing to add except to say that the cases which were cited, the *Royal British Bank* v. *Turquand* (2) and

(1) [1892] 1 Ch. 64. (2) 6 E. & B. 327.

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the case in the House of Lords, *Mahoney* v. *East Holyford Mining Company* (1), are conclusive to shew that this was a duly executed deed.

For these reasons I think that the judgment appealed from should be reversed and the appeal allowed.

Solicitors: *Riddell, Vaizey & Smith*, agents for *Vachell & Son, Cardiff*; *Ince, Colt & Ince*, agents for *Ingledew & Sons, Cardiff*.

M. W.

MARSHALL *v.* TAYLOR.

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[1894 M. 104.]

Limitations, Statute of—Hedge and Ditch—Presumption of Ownership—Dispossession—Acts of Ownership—Real Property Limitation Acts, 1833 *and* 1874 (3 *&* 4 *Will.* 4, *c.* 27, *s.* 3; 37 *&* 38 *Vict. c.* 57, *s.* 1).

The Plaintiff and Defendant were owners of adjacent houses. The gardens of the two houses were formerly separated by an open ditch, and on the Plaintiff's side of the ditch was a hedge. In 1868 the owner of Plaintiff's house laid drain-pipes along the ditch, into which he allowed the drainage of his own and the Defendant's house to run, and at the same time covered in the ditch. From that time the surface of the ditch was used by the owner of Defendant's house as part of his garden; and more than twelve years before the action was brought the Defendant paved part of the surface with cobble-stones and laid cinders on part, and also planted a rose-garden and made a fowl-house on other parts. But the Plaintiff continued to cut his hedge from the Defendant's side, and on two occasions opened the ditch to clean out the drains:—

Held (reversing the decision of the Vice-Chancellor of the County Palatine of *Lancaster*), that, assuming that the Plaintiff was the original owner of the ditch, he had lost the ownership of the surface by lapse of time, the acts of ownership of the Defendant having been sufficient to dispossess him within the meaning of the 3rd section of the 3 & 4 Will. 4, c. 27.

Leigh v. *Jack* (2) distinguished.

Quære, whether the presumption that a ditch belongs to the owner of the adjacent hedge applies to a natural watercourse or only to an artificial ditch.

THIS was an appeal from a decision of Mr. *W. F. Robinson*, Q.C., Vice-Chancellor of the County Palatine of *Lancaster*.

(1) Law Rep. 7 H. L. 869. (2) 5 Ex. D. 264.

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The Plaintiff *James Marshall* and the Defendant *William Taylor* were the owners of adjacent houses at *Aughton*, facing the road from *Preston* to *Liverpool*. Both houses were surrounded by a garden. The two gardens were formerly separated by an open ditch running east and west, into which the drainage of the Plaintiff's house used to run, and on the south side, on which the Plaintiff's house stood, there was a high beech-hedge. The owner of the Plaintiff's house used to cut this hedge and keep it in order, and for that purpose to stand, when necessary, in the ditch on the north side of the hedge. About the year 1868 the previous owner laid drain-pipes along the ditch, into which the drainage of the Plaintiff's and Defendant's houses ran, and he at the same time covered in the ditch. The Plaintiff purchased his house in 1871. In the deed of conveyance the property was described as "all that messuage and garden and land thereto belonging, containing together 3 roods and 24 perches, including the hedge-row or fence on the north-west side of the said premises."

The Defendant came into possession of his house in 1875. According to the measurement of the property in the purchase-deed it did not appear to include the ditch in question. But ever since the ditch had been filled in the surface had been within the yard and garden of the Defendant's house, and had been used as a pathway to the further end of his garden. This pathway the Defendant covered with cinders, and he paved that portion of it which ran past his stables and coach-house with cobble-stones. He also erected a fowl-house on the pathway at the end of his garden, and planted rose-trees and other trees in another part of it.

The Plaintiff still, however, continued to cut his hedge from the north side when it required trimming, and on two occasions he opened the ditch for the purpose of cleaning out the drain. This was done with the knowledge and acquiescence of the Defendant, but the evidence was not clear whether the Defendant's permission to enter his garden had been previously obtained.

The Plaintiff now brought an action for a declaration that the slip of land, to the distance of four feet from the Plaintiff's

hedge, forming the site of the ditch, belonged to the Plaintiff, and for an injunction to restrain the Defendant from trespassing on that strip of land.

The Vice-Chancellor was of opinion that the evidence proved that the ditch originally belonged to the Plaintiff, and that he had not been dispossessed of it within the meaning of the 3rd section of the 3 & 4 Will. 4, c. 27, by the acts of ownership of the Defendant, such acts being in his opinion not inconsistent with the Plaintiff's continued ownership of the land. He therefore made the declaration and granted the injunction prayed, but subject to such easements as the Defendant had acquired over it.

The Defendant appealed from this judgment.

Neville, Q.C., and *A. Rutherford*, for the Appellant:—

The presumption that a ditch belongs to the owner of the hedge only applies to an artificial boundary ditch; but there is no evidence that the ditch in the present case was an artificial ditch. It is more probable that it was a natural watercourse. But if the ditch originally belonged to the Plaintiff or his predecessors, it passed into the possession of the owner of the Defendant's house more than twelve years before the action was brought, probably by an arrangement between him and the owner of the Plaintiff's house, and he has exercised acts of ownership over it ever since: *Norton* v. *London and North Western Railway Company* (1).

Warrington, Q.C., and *T. R. Hughes*, for the Plaintiff:—

The evidence shews that the ditch was artificial, and was not a natural watercourse. It was clearly the boundary between the two properties, and the presumption is that it belonged to the owner of the hedge. And this is corroborated by the fact that he trimmed the hedge from the side on which the ditch was when it required trimming: *Vowles* v. *Miller* (2). It is true that some acts of ownership were done by the Defendant; but they were all consistent with the continued ownership of the Plaintiff. There was, therefore, no dispossession of the Plaintiff within the meaning of sect. 3 of the *Statute of Limitations*

(1) 13 Ch. D. 268. (2) 3 Taunt. 137.

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(3 & 4 Will. 4, c. 27). The Plaintiff still retained possession of the ditch for all the purposes for which he had ever used it: *Leigh* v. *Jack* (1); *Searby* v. *Tottenham Railway Company* (2).

LORD HALSBURY:—

So far as the facts found by the Vice-Chancellor are concerned I am not disposed to interfere with his conclusions. The only point in which I differ from him is the inference he has drawn from the facts which he has found; and in that respect I am afraid I cannot concur with him.

With reference to the origin of this property—this strip of four feet running down for a distance of eighty feet—I do not feel very strongly either one way or the other. I think the inclination of my opinion would be, if I were compelled to arrive at a judgment upon it, that the Plaintiff originally possessed this piece of land, though perhaps I am more influenced than I ought to be by the exact coincidence of the measurements. I do not know whether there was originally or not a drain here, and I place no reliance at all upon any supposed presumption that arises from the position of the hedge and the ditch, if it was a ditch. I entertain considerable doubt myself whether it was not a small grip formed by the lie of the land, and the wash of the rain-water rushing down gradually enlarged it until it became what people agreed to call a ditch; but the undoubted fact remains that at one period the Plaintiff's predecessor in title did cover it in, and did make this drain; although that fact also is qualified by this, that in making the drain it was made a drain for both houses; and one perhaps might infer that it was done at the joint instance of both parties, as it drained both houses. As we do not know anything of the facts, except that it was done by one of the parties, it might possibly have been done by one at the expense of both, or with the assent of the other; but coupling the description in the Defendant's conveyance with the undoubted fact that it was the Plaintiff who did cover in this which has now become a sewer (I hardly know how to describe it), the inclination of my opinion undoubtedly is, that it did once belong to the Plaintiff.

(1) 5 Ex. D. 264. (2) Law Rep. 5 Eq. 409.

But then the question comes, whether, under the statute, the occupation of it since that time has not been such as to exclude the Plaintiff, and to give it to the Defendant. I come to the conclusion that it has. It is impossible, I think, to speak with exact precision about the degree of possession or dispossession that will do, unless you have regard, as Lord Justice *Cotton* said, in the case which is so much relied upon, *Leigh* v. *Jack* (1), to the nature of the property. In that case, which the Vice-Chancellor himself quotes, the person who set up a possession inconsistent with the rights of the person to whom the property originally belonged had a strip of land on either side of the intended road, and he incumbered that intended road with various articles of his trade, but in no sense was there any exclusive possession. As I read the facts, and the arbitrator there found, there was no exclusive possession sufficient to make the possession change so as to put it in him and dispossess the real owner of the land. But such a piece of land, and such a user, seems to me to have no relation at all to such a thing as we are now discussing. The true nature of this particular strip of land is that it is inclosed. It cannot be denied that the person who now says he owns it could not get to it in any ordinary way. I do not deny that he could have crept through the hedge, or, if it had been a brick wall, that he could have climbed over the wall; but that was not the ordinary and usual mode of access. That is the exclusion—the dispossession—which seems to me to be so important in this case. It is true that for a certain number of years, say fifteen years—which is, I think, the longest period of which there is actual evidence—the owner of the adjoining garden, perhaps the original owner of this piece of land, was in the habit of sending his agent into the other garden and clipping the hedge. But the same witness who proves that proves that he had at some time deposited the clippings on the midden belonging to the Defendant, and that sometimes he left it at other parts of the ground; but, as was fairly admitted, he was doing acts which by no possibility could be acts done as of right. Neither, as far as I can see, was there any right to go through the gate. The very fact that he could have got through

(1) 5 Ex. D. 264.

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the hedge indicates to my mind that there could have been no right to go through the gate, which admittedly belongs to the present Defendant. Then are we to infer, although it is accompanied by a request to be allowed to go through the gate of the present Defendant, accompanied by acts which undoubtedly are done by permission, that there was still a possession in the Plaintiff which entitles him to say he has never been dispossessed because he did clip this hedge? I confess that does not appear to me to be a reasonable inference. When we come to see what the property of the Defendant is—that part of this place is covered with cobble-stones, and made a part of the yard—that on another part of it a rose-garden is made, and when we consider the continuity of the pathway, which is also cindered and treated as part of the adjoining garden, it seems to me it is about as strong an aggregate of acts of ownership as you can well imagine for the purpose of excluding the possession of anybody else. [His Lordship then referred to portions of the evidence which led to the inference that the Plaintiff in recent times treated the hedge as his boundary, and asked permission of the Defendant to enter his garden for the purpose of cutting the hedge. He then continued:—]

Under these circumstances, I come to the conclusion that, whatever may have been the original state of the title, there has been complete dispossession of the Plaintiff here, and that subject to the right, which is also left in obscurity, for the joint occupation and user of the drain-pipes themselves for the purpose of carrying the drainage from both houses, the Defendant is now entitled to the possession of this piece of land in dispute. I therefore think that this appeal ought to be allowed.

LINDLEY L.J.:—

I have arrived at the same conclusion as my Lord. I do not think the case is a very easy one to determine. We start with this: that as far back as we know the real state of things, there were two coterminous pieces of land belonging to two houses which were close to each other, and we are told that the land was of this description: the watershed sloped from the highway to the west, and the land sloped on both sides down to what has

been referred to as the ditch. That there was something in the shape of a ditch or drain between the ground occupied now by the Plaintiff and by the Defendant, running from the road downhill towards the west, seems pretty plain. Whether that ditch or drain, or whatever you call it, was artificial or whether it was natural, nobody knows. It did not run straight like a ditch cut for a drain; but it ran more or less meandering down, twisting about more or less as shewn by the plan, and on the Plaintiff's side of it there was a thick, tall beech-hedge, and that hedge belongs to the Plaintiff. There is no doubt about that. The ownership of the ditch, if it rested on presumption, would, I should say, be extremely doubtful. I doubt very much whether the ordinary doctrine which we find laid down in the books is applicable to a case where you do not know that the ditch is artificial. When you do know that the ditch is artificial, there is no difficulty in applying the ordinary rule that the ditch belongs to the hedge, and that the owner of the hedge is the owner of the ditch; but when you know nothing about the ditch, I doubt whether that presumption arises. Now, it is certain that in 1868 the Plaintiff's predecessor filled up that ditch, and put in a pipe-drain which has been used from that time down both by the Plaintiff and the Defendant and their predecessors. That distinct act of ownership, as to which there is no dispute, looks very much as if the ownership of the ditch was in the Plaintiff, and I shall assume it was. I think that is rather strengthened by the measurement of the Defendant's land in his conveyance. Therefore, apart from the presumption and taking the facts as I have stated them, and giving due effect to that act of ownership in 1868, I shall assume that that ditch was the Plaintiff's. He did not put up a fence or posts or do anything which would indicate an intention to retain possession of the surface. He simply left it alone, and from 1868 downwards the soil that has been put in the ditch by the Plaintiff has been used by the Defendant in the way I will mention. All that portion of it which was next the beech-hedge, about seventy or eighty feet from the road, has been treated by the Defendant as his own. He has planted it; he has made a fowl-house on it; he has put rose-trees on it and cultivated them; he has put cobbles on it for the use of his stables, and

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has cindered it. From about 1875 he has used it as part of his own kitchen-garden.

Now, what has the Plaintiff done? He has trimmed the hedge, and in doing that, except once, when I think somebody got through the hedge, he has always been round by the Defendant's front gate, either asking leave or taking it for granted there was no objection, and, when he has gone round and trimmed the hedge, he has, by leave of the Defendant, put the trimmings upon the Defendant's midden. In addition to that this drain has been twice blocked up, and the Plaintiff has opened it out and put it right. Now, what is the inference from that? Can it be said that the Defendant has had possession of that strip of land for the time necessary to give him title by the *Statute of Limitations*? Or is it to be said the Plaintiff has retained possession to such an extent as to prevent the Defendant from acquiring such title? When you look at the whole circumstances, and the unquestioned enjoyment of that strip of land by the Defendant by doing what I have referred to, I think the true inference is that the Defendant has been in possession to the exclusion of the Plaintiff, and that all the Plaintiff has done is to clip this hedge. Whether he has an easement to do it or not I do not know. It has never been questioned, and always has been done in a friendly way. I think it is very likely that he has a right to go on the Defendant's land to clip this hedge. But when it comes to the ownership of the soil, it strikes me the Defendant has made out such an exclusive possession of this little strip of land by using it in the way which he has done for so many years that he has acquired a title by the statute. That view of the case, the learned Vice-Chancellor thought, was displaced by the case of *Leigh* v. *Jack* (1). I do not think it is when you look at it. I think the case is much nearer *Norton* v. *London and North Western Railway Company* (2). The Court there came to the conclusion there had been enough done to give title by the statute.

Therefore, assuming as I do that this little bit of land was originally the Plaintiff's, it seems to me he has lost it by the uninterrupted possession of the Defendant. I think, therefore, the appeal ought to be allowed.

(1) 5 Ex. D. 264. (2) 13 Ch. D. 268.

A. L. SMITH L.J.:—

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I am of the same opinion. This is an action brought by the Plaintiff to recover possession of a long strip of land, four feet in width, which lies on the other side of the hedge to that on which his own premises are situate. The Defendant says to the Plaintiff that which every Defendant is entitled to say when sued in ejectment, "First of all, prove the land is yours," and then, "Assuming you make out that at one time the *locus in quo*, that is this strip of four feet wide, on the other side of your hedge, was yours, I say I have acquired a right to it under the statute, having been in possession of it for more than twelve years before action brought."

Now, speaking for myself, I should certainly have come to the conclusion as regards the first issue that the Plaintiff had made out that at one time this strip of land had been his own freehold. I am not at all sure that the presumption—whether it is of fact or law I do not stop to inquire—that where you have what apparently is an artificial hedge and an artificial ditch, the ownership of the soil, not only of the hedge, but of the ditch, belongs to the person who has the field inside the hedge, applies to this case, for the ditch does not appear necessarily to be an artificial ditch, but may have been a watercourse formed by nature. It is not necessary to decide this, because it appears that that act of the Plaintiff in 1868 is the strongest possible fact to shew that at that time everybody treated the ditch as belonging to the Plaintiff. A stronger act of ownership cannot be exercised over a piece of land like this than to fill up a ditch and bear the expense of it, which the Plaintiff did on that occasion, and this *primâ facie* case is strongly fortified by the fact that when the Plaintiff looks into the Defendant's title-deeds he finds that the Defendant never bought this four feet at all, according to the dimensions in his deeds. Therefore, if the only point in this case had been whether or not this four feet strip of land had ever been the Plaintiff's, I should certainly have held that the Plaintiff had made out his case—that it did at one time belong to him.

Now when this strip of land was filled up by the Plaintiff in 1868, he apparently laid down in it a drain-pipe which was to be

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the common drain for the Plaintiff's and the Defendant's house. Now what has happened since that date? First of all, on the Defendant's side of the hedge the Defendant planted oak, rose, and other trees upon a portion of this strip. That was done, we were told, about 1875, and is as strong an act of ownership as one man can exercise over a piece of land; and the trees have been allowed to remain unmolested by his neighbour, the Plaintiff, for a period of sixteen or seventeen years. But that is not all. Over another portion of this disputed strip the Defendant paved the land with a cobble pavement. That, again, is as strong an act of ownership as well can be. Those cobbles have been allowed to remain from the time when they were put down in 1875 till the present time. Then, what next was done? The Defendant did not wish to carry the cobbles all down the side of his garden, so, having planted a portion of this four feet strip of land, and having paved another portion of it, he has, over the residue of the four feet, according to the learned Vice-Chancellor's finding, which I adopt, made a cinder-path for the purpose of traversing the surface of it and going to a fowl-house, which he erected over a portion of the strip at the end of the garden. Those acts were all done somewhere about the year 1875, or, at any rate, more than twelve years before action brought. Now what is the law applicable to such a state of facts as this? It is this: there must be actual possession by the one and a discontinuance of possession by the other; or, in other words, in this case it must be proved by the Defendant, who is setting up the *Statute of Limitations*, that there has been an actual possession of the land in dispute by him for the statutory period, and during that period a discontinuance of possession by the Plaintiff. Those two facts must be always proved to constitute a defence under the statute. I have recapitulated the facts, and I cannot myself think that a stronger case could well be made out of actual possession by the Defendant, considering the *locus in quo* which is in dispute.

Now comes the other question. Although the Defendant has been in actual possession of this land for the necessary period of twelve years, has the Plaintiff at the same time been out of possession—has he discontinued possession of this land? The nature of the land has been such that the Plaintiff could never

get on to it without asking leave or crawling through the hedge; but he says he has not discontinued possession of this strip of land because year by year, without asking leave except to get in—and very likely without asking leave to get in—he has gone to the other side of his beech-hedge and trimmed it. Is that a continuing in possession of the four feet of land, or is it consistent with his simply having an easement over the Defendant's land for the purpose of trimming the hedge? The case that was cited of *Norton* v. *London and North Western Railway Company* (1) is very apposite to this, for in the judgment of this Court, which was delivered by Lord Justice *James*, it was pointed out that, although the land in dispute undoubtedly at one time had been the land of the railway company, still by non-user they had lost their right to it, and as the only thing they did was going round to clip the other side of the hedge on the outside of the line, that was not an act of possession at all, but was to be attributed to an easement to trim the hedge, which it was their duty to do. Now, what other act of possession during all this period does the Plaintiff set up? He says that twice since 1868, when the drain-pipe was choked and overflowed, and the water therein flowed back into the Plaintiff's and the Defendant's premises, first about ten years ago, and again in the year 1894, he went in and took up what was necessary for the purpose of cleaning this drain so as to allow the water to escape down it, and not overflow the surface. To what is that to be attributed? Is that to be attributed to a right he had of cleaning so as to have the sewage discharged down the drain, or is it an act of ownership which shews there had been no discontinuance of possession by the Plaintiff during the statutory period? In my judgment those acts are applicable to the former, and not to the continuance in possession of the soil during the statutory period.

For these reasons I think the judgment of the Court below should be reversed and entered for the Defendant.

Solicitors: *Wynne, Holme & Wynne*, agents for *Kennedy & Glover, Ormskirk; Norris, Allens & Chapman*, agents for *J. M. Quiggin & Brothers, Liverpool.*

(1) 13 Ch. D. 268.

M. W.

C. A.
1895
Feb. 8;
March 11

In re LENG.
TARN *v.* EMMERSON.

[1893 T. 278.]

Administration—Insolvent Estate—Creditor—Priority—Claim of Wife for Money lent to Husband for Purposes of Trade or Business—Postponement of Claim—Married Women's Property Act, 1882 (45 & 46 *Vict.* 75), *s.* 3—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.

By the combined effect of sect. 3 of the *Married Women's Property Act*, 1882, and sect. 10 of the *Judicature Act*, 1875, in the administration by the Court of the assets of a deceased person whose estate may prove to be insolvent, the claim of the widow for money lent to the deceased for the purposes of his trade or business is postponed to the claims of his other creditors.

In re Maggi (1) considered.

Sect. 10 of the *Judicature Act*, 1875, applies to an estate of a deceased person which is sufficient for payment in full of his debts and liabilities, apart from the costs of administration, but becomes insufficient by reason of such costs.

THIS was an appeal from a decision of the Chancellor of the County Palatine of *Durham*.

Mary Elizabeth Tarn, on behalf of herself and all other creditors of *George Leng*, deceased, brought an action against the executrix of his will for the administration of his estate.

The testator's widow carried in a claim in the administration for advances made to the testator in his lifetime for the purposes of his business, and her claim was allowed at £71, with a further sum for costs.

On taking the accounts, it appeared that at the death of the testator his assets exceeded his debts, but that such assets were not sufficient for payment of the debts in full, after providing for the costs of the administration action. Upon the further consideration of the action the Plaintiff applied that the widow's claim might be postponed to the claims of the other creditors. The Chancellor of the Duchy held that upon the true construction of sect. 10 of the *Judicature Act*, 1875, and sect. 3 of the

(1) 20 Ch. D. 545.

Married Women's Property Act, 1882, the claim ought to be postponed, and declared accordingly. The widow appealed.

Redman, for the Appellant:—

The question is whether, by the combined operation of sect. 3 of the *Married Women's Property Act*, 1882 (1), and sect. 10 of the *Judicature Act*, 1875 (2), a married woman who has lent money to her husband for the purposes of his business is prevented from proving in competition with his other creditors in an administration action in which the estate of the testator was sufficient to pay all his debts or liabilities at the date of his death, but became insufficient by reason of the costs of administration.

First, this estate is not insolvent. Sect. 10 of the *Judicature Act*, 1875, applies to the assets of any person "whose estate may prove to be insufficient for the payment in full of his debts and liabilities," and to any company "whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up." The difference of the language in the two cases shews that in determining the solvency of the estate of a deceased person for the purposes of this section the Legislature did not intend that the costs of administration should be taken into account.

Secondly, this section does not extend sect. 3 of the *Married*

(1) Sect. 3 of the *Married Women's Property Act*, 1882, is as follows:—

"Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

(2) By sect. 10 of the *Judicature Act*, 1875, "in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under the *Companies Acts*, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities, and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

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Women's Property Act to the case of an administration. It does not incorporate all the bankruptcy law, but only rules in particular matters: *In re West of England Bank* (1); *In re Albion Steel and Wire Company* (2); and it does not affect the rights *inter se* of members of the same class of creditors: *In re Maggi* (3); *In re Williams* (4).

Sect. 3 of the *Married Women's Property Act* cannot be regarded as a rule in bankruptcy within sect. 10 of the *Judicature Act*, 1875. The only decision upon the combined effect of the two sections is *In re May* (5), which deals with the right of retainer.

Gatey, for the Plaintiff:—

As to the first point.

The provision relating to insolvent estates is a re-enactment of sect. 25 of the *Judicature Act*, 1873, which did not include companies. No argument, therefore, can be founded on the difference of the language in the two parts of sect. 10. The object of sect. 10 is to place insolvent companies for the purposes of the section on the same footing as insolvent estates. The costs of the administration action are included in the costs of realizing the estate, and an estate is not solvent if it is not sufficient to pay the debts of the deceased after providing for such costs. The section must not be so construed as to make it enact an absurdity. Further, the section applies if there is reasonable ground for believing that the estate will be insolvent: *In re Hopkins* (6). [Upon the second point he cited *In re Genese* (7), and *In re Grason* (8).]

G. W. Melville Dale, for the Defendant.

Redman, in reply.

Cur. adv. vult.

March 11. LINDLEY L.J.:—

This case turns on the combined effect of sect. 3 of the *Married Women's Property Act*, 1882, and sect. 10 of the *Judica-*

(1) 12 Ch. D. 823.
(2) 7 Ch. D. 547.
(3) 20 Ch. D. 545.
(4) 36 Ch. D. 573, 583.
(5) 45 Ch. D. 499.
(6) 18 Ch. D. 370.
(7) 16 Q. B. D. 700.
(8) 12 Ch. D. 366.

ture Act, 1875. Sect. 3 of the *Married Women's Property Act* (45 & 46 Vict. c. 75) runs thus. [His Lordship read it, and continued:—] This section is curiously framed. Money lent always becomes the property of the borrower as soon as he gets it. The money is his, although he owes money to the same amount with or without interest as the case may be. The section nevertheless first of all makes money lent or entrusted by a wife to her husband for the purposes of his trade his assets in the event of his bankruptcy. This, I suppose, is intended to be a qualification of the previous section, sect. 2, which, as regards property, treats a married woman as a *feme sole*. The qualification, however, is not general, but is confined to the case of her husband's bankruptcy, by which is meant when he has been adjudicated. If the section had stopped there the wife would have had no claim against the assets of her bankrupt husband even after payment of his other creditors; her assets would have to be treated in bankruptcy as his. To prevent this, words are added to preserve her rights when all his creditors for money or money's worth are paid. Subject to their payment, she may claim a dividend as a creditor. But she can claim nothing in the bankruptcy until after payment of all her husband's other creditors. In other words, in bankruptcy she has no provable debt until her husband's other creditors are paid. This is the short effect of the section, although it is most awkwardly expressed. *In re Genese* (1) is quite in accordance with this view. It was there held that a wife could not prove against her husband's estate until his other creditors had been paid 20*s.* in the pound.

I pass now to the *Judicature Act*, 1875, s. 10. [His Lordship read it, and continued:—] Few sections in the *Judicature Act* have created more difficulty than this, but certain points are now settled. It is settled that the rules in bankruptcy which increase a bankrupt's assets—*e.g.*, the reputed ownership clause, the fraudulent preference clause, and the sections which defeat certain settlements and executions—do not apply to the administration in Chancery of the assets of a deceased person. Those assets must be ascertained by applying the

(1) 16 Q. B. D. 700.

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general laws of property, and not the special rules applicable only to cases of bankruptcy. The authorities for this proposition are *In re Withernsea Brickworks* (1), *In re Maggi* (2), and *Pratt* v. *Inman* (3). See also *In re Baker* (4). Two further rules have been settled, namely: First, that the common law right of an executor or administrator to retain a debt due to himself is not affected by sect. 10 of the *Judicature Act*, 1875: *Lee* v. *Nuttall* (5); *In re May* (6); secondly, that this section has not deprived judgment creditors of their right to be paid in priority to other creditors in an administration action, although they have no priority in bankruptcy: see *Smith* v. *Morgan* (7) and *In re Maggi*. In *In re Maggi*, Lord Justice (then Mr. Justice) *Fry* came to this conclusion. But in commenting on sect. 10 of the *Judicature Act*, 1875, he seems to have overlooked the words, "as to debts and liabilities provable," and he considered that sect. 32 of the *Bankruptcy Act*, 1869, which enacted that, subject to certain specified exceptions, all debts should in bankruptcy be paid *pari passu*, was not made applicable to administration actions. No doubt if that section were held applicable in all cases it would exclude the right of an executor to retain his own debt and would deprive judgment creditors of their priority. But these persons are entitled to preference on grounds peculiar to themselves, and the rules which favour them are rather exceptions to ordinary rules as to payment of debts than illustrations of those rules. Whilst I recognise the exceptions, I cannot myself go so far as to say that the general rule in bankruptcy which requires debts (with some exceptions) to be paid *pari passu* is not applicable in administration actions where the estate being administered is insolvent. Whether debts entitled to priority in bankruptcy are to be treated as entitled to similar priority in administering the assets of a deceased insolvent was a question on which decisions were conflicting (compare *In re Albion Steel and Wire Company* (8); *In re Association of Land Financiers* (9)).

(1) 16 Ch. D. 337.
(2) 20 Ch. D. 545.
(3) 43 Ch. D. 175.
(4) 44 Ch. D. 262.
(5) 12 Ch. D. 61.
(6) 45 Ch. D. 499.
(7) 5 C. P. D. 337.
(8) 7 Ch. D. 547.
(9) 16 Ch. D. 373.

All doubt on this point was, however, removed by an Act passed in 1888 (51 & 52 Vict. c. 62, s. 1, sub-s. 6), which makes the rules in bankruptcy applicable.

Construing sect. 10 of the *Judicature Act*, 1875, by the decisions and by the express provision of sect. 1, sub-sect. 6, of the Act of 1888, the rules in bankruptcy as to debts and liabilities provable must now, I think, include all rules as to priorities expressly enacted by any statute and made applicable in the event of bankruptcy. The priority conferred in the case of bankruptcy by the *Married Women's Property Act*, s. 3, must, therefore, in my opinion, be treated as imported by sect. 10 of the *Judicature Act*, 1875, into the administration of the estates of deceased insolvents. It was urged that the last part of sect. 3 of the *Married Women's Property Act* was only a qualification of the first part, and that as the first part of the section does not affect debts provable, but relates only to what are to be treated as assets, that part of the section is not one of the rules in bankruptcy to which sect. 10 of the *Judicature Act*, 1875, applies, and that consequently the second part, which is in effect a proviso to the first, cannot be regarded as one of such rules. I confess that I was at first disposed to think this view correct, but on reflection I cannot adopt it. If we were to accede to this argument we should be attaching too much weight to the first part of the section and too little to the second part, and we should miss the true meaning of the section as a whole. I have already stated what I take to be its effect, and although it is badly drawn the section is really a statutory rule postponing a wife's claim against her husband's estate in bankruptcy to the claims of his other creditors. This is, therefore, one of the rules as to debts provable which by sect. 10 of the *Judicature Act*, 1875, have to be observed in administering the estates of deceased insolvents. This conclusion is not inconsistent with *In re May* (1), which was not a case of proof, but of retainer by the wife as her husband's administratrix. The Legislature has not yet thought proper to alter the law of retainer, and sect. 3 of the *Married Women's Property Act* is not addressed to that subject.

It only remains to notice the point that the husband's estate is

(1) 45 Ch. D. 499.

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not proved to be insolvent. When he died his assets exceeded his debts; but, unfortunately, the costs of the administration action have to be provided for, and it is admitted that his estate is insolvent if the costs of the administration action are to be taken into account. But these costs must be paid out of the estate of the deceased before any question can arise which concerns the payment of his creditors. With reference to their payment and to their priorities *inter se* it would be contrary to common sense to call an estate solvent when the amount divisible amongst them is not sufficient to pay them all in full. Then reliance was placed on the phraseology of sect. 10 when dealing with companies, and on the maxim "*Expressio unius est exclusio alterius.*" This maxim, however, is seldom satisfactory unless some good reason can be given for supposing that the speaker really intended to exclude what he did not expressly mention. In this particular case such an intention would be unreasonable and cannot be imputed to the Legislature. The express mention of costs in dealing with companies being wound up and the omission of all mention of costs in dealing with the estates of deceased persons are easily accounted for. The section applies to all modes of winding up companies, but only to one mode of administering the estates of deceased persons—namely, administration by the Court. It may well have been considered desirable to point out to liquidators winding up insolvent companies without the assistance of the Court that they must deduct the costs of winding up and then see whether the assets left are sufficient to pay the debts in full or are insufficient for that purpose. It was quite unnecessary to instruct the Judges of the High Court on such a subject. For these reasons I am of opinion that the decision of the Chancellor of the Duchy was correct, and that the appeal must be dismissed. The Appellant must pay the Plaintiff's costs of the appeal. The costs of the Defendant, the executrix, will be paid out of the estate.

A. L. SMITH L.J.:—

The first and main question is, whether when a deceased husband's estate is being administered in the Court of Chancery and is unable to pay its creditors in full, the rule which

applies in bankruptcy as to the wife's proof against her husband's estate, for money lent by her to him for the purposes of his trade, is to be imported when the widow claims in the administration against the estate of her deceased husband.

The statutes which relate to this point are as follows: By sect. 25, sub-sect. 1, of the *Judicature Act*, 1873, it is enacted that in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rule shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt. By sect. 10 of the *Judicature Act*, 1875, sub-sect. 1 of sect. 25 of the Act of 1873 is repealed, and is thereby re-enacted with this addition, that the enactment is made applicable to the winding-up of companies, in addition to the administration of estates of deceased persons by the Court which are insufficient to pay their debts in full.

In 1882 the *Married Women's Property Act* of that year became law (45 & 46 Vict. c. 75). By sect. 3 it is enacted in effect that any money of a wife lent by her to her husband for the purposes of his trade shall be treated as assets of her husband in the case of his bankruptcy under reservation of the wife's claim to a dividend as a creditor for the amount so lent after, but not before, all claims of the other creditors of the husband have been satisfied. If the husband becomes bankrupt, it is clear that the rule which is enacted by statute is that for money lent by the wife to her husband for the purposes of his trade she is not to prove till her husband's other creditors have been satisfied, and this was rightly so held by Mr. Justice *Cave* in *In re Genese* (1).

We have, therefore, one statute (the *Married Women's Property Act*, 1882) laying down in clear terms what the rule of bankruptcy is to be as regards the proof of a wife in the case of

(1) 16 Q. B. D. 700.

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bankruptcy of her husband, and another statute (*Judicature Act*, 1875) enacting that in administering insolvent estates of deceased persons the same rules shall be observed as may be in force for the time being under the law of bankruptcy. So far matters are apparently clear; but it is said that although there are these two statutes standing together, cases have decided that the rule laid down in sect. 3 of the *Married Women's Property Act*, 1882, is, not by sect. 10 of the *Judicature Act*, 1875, imported into administrations of deceased husbands' estates which are insolvent.

In the first place, I should say that I know of no case which deals with the conjoint operation of sect. 10 of the Act of 1875 and sect. 3 of the Act of 1882 with the exception of *In re May* (1), which was not a case, as the learned Judge himself pointed out, of the widow seeking to prove, but of the right of retainer by the widow, to which sect. 3 of the Act of 1882 did not apply.

It is true that it has been held by authority which cannot be controverted that all the rules of bankruptcy are not incorporated into the administration of insolvent estates by sect. 10 of the Act of 1875; and the question now is, whether the rule in sect. 3 of the Act of 1882 is so or not.

It is difficult to extract from the cases the principle upon which each has been decided, with this exception, that I think it may be stated that the Courts have held that sect. 10 of the *Judicature Act*, 1875, does not import into administrations those provisions of the bankruptcy law which merely go to swell the assets of the estate which is being administered, such, for instance, as the provisions by which a judgment creditor is not allowed to reap the benefit of his execution by reason of a bankruptcy intervening before its completion: *In re Withernsea Brickworks* (2), followed by Mr. Justice *Chitty* in *Pratt* v. *Inman* (3); or the provision that money received by way of a fraudulent preference must be returned.

But has any binding authority gone further, and held that the rules as to proof of debts in bankruptcy are not incorporated? If

(1) 45 Ch. D. 499. (2) 16 Ch. D. 337, 341.
(3) 43 Ch. D. 175.

there be such an authority, what becomes of the express words in sect. 10 of the Act of 1875, "the same rule shall prevail . . . as to debts and liabilities provable"? Lord Justice *Cotton*, in *In re Withernsea Brickworks* (1), stated what I take to be the principle, if there be one, to be extracted from the cases, when he said: "What is proposed to be done in the present case is not to apply a particular rule to the administration of the assets of the company, but to bring into the assets something which, apart from this section" (sect. 10), "would not be assets, because it has been seized by a creditor under such circumstances that he can hold it as a security for his debt."

As regards swelling the assets to be distributed, it appears to me that the cases have decided that the law of bankruptcy does not apply; but as regards the distributing of the assets, *i.e.*, as regards the proofs to be allowed, I find no case binding me to hold that the rules of bankruptcy do not apply. It is true that in 1882 Lord Justice (then Mr. Justice) *Fry*, in the case of *In re Maggi* (2), held that the bankruptcy rule that all debts shall be paid *pari passu* (sect. 32 of *Bankruptcy Act*, 1869) was not imported into the administration of insolvent estates, and that a judgment creditor took priority over creditors; and he placed what he termed the narrower construction upon sect. 10 of the *Judicature Act*, 1875, and he held that it was confined to cases in which the rights of a class of secured creditors were conflicting with a class of unsecured creditors, and had no application to the rights *inter se* of the members of those classes.

This is not a decision upon the conjoint operation of the two statutes which we have now to consider, and I therefore do not inquire if the learned Judge's construction of sect. 10 is not too narrow; and, moreover, the case does not bind me.

Now, what is the true reading of sect. 3 of the Act of 1882? It is said that the first limb of the section goes to swell the assets of the estate which is being administered; and this is true, for without the first limb of the section the wife's money would have been a provable debt, and it not being so until after the other creditors are satisfied, the assets are *pro tanto* enhanced; but this is not all the section enacts, for it expressly and in

(1) 16 Ch. D. 341. (2) 20 Ch. D. 545.

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A. L. Smith L.J.

unmistakable terms enacts that her proof shall be postponed till the other creditors of the husband are satisfied.

It appears to me that sect. 3 of the *Married Women's Property Act* is explicit as to the proof of the wife. I cannot get over the enactment, and I do not see that cases cited bind me to hold otherwise.

I therefore am of opinion that the Chancellor arrived at a right conclusion.

As to whether the costs of administration were to be added before ascertaining whether the deceased husband's estate could pay its liabilities in full, I am of opinion that they must be, though in this case they certainly appear to me to be very large.

LORD HALSBURY concurred.

Solicitor for Appellant: *A. S. C. Doyle,* agent for *J. Ingram Dawson, Barnard Castle.*

Solicitors for Plaintiff: *Huntington & Leaf,* agents for *Richardson & Piper, Barnard Castle.*

Solicitors for Defendant: *Belfrage & Co.,* agents for *J. H. Holmes, Barnard Castle.*

H. C. J.

In re BOWLING AND WELBY'S CONTRACT.

C. A. 1895 March 14.

[1894 B. 203.]

Unregistered Company—Winding-up—"More than Seven Members"—Jurisdiction—Res judicata—Purchase from Liquidator—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 199.

An unregistered company cannot be wound up under the 199th section of the *Companies Act*, 1862, unless there are more than seven existing members at the date of the winding-up petition. Representatives of deceased members, trustees of bankrupt members, and past members, although liable to contribute to the debts of the company, are not members within the meaning of the section.

A winding-up order is not a judgment *in rem*, and, if made improperly, is not binding on strangers.

In re Padstow Total Loss and Collision Assurance Association (1) distinguished.

THIS was a summons under the *Vendor and Purchaser Act*, 1874.

On the 17th of October, 1893, *C. H. Welby* contracted to purchase certain freehold houses from *J. Bowling*, the Official Receiver and Liquidator of the *Leeds and Yorkshire Permanent Benefit Building Society*.

The society was established in 1851, and was enrolled under the *Building Societies Act*, 1836 (6 & 7 Will. 4, c. 32), but had not been incorporated under the *Building Societies Act*, 1874 (37 & 38 Vict. c. 42).

An order was made to wind up the society by the judge of the *Leeds* County Court under the 199th section of the *Companies Act*, 1862, which provides that, "subject as hereinafter mentioned, any partnership, association, or company, except railway companies incorporated by Act of Parliament, consisting of more than seven members and not registered under this Act, and hereinafter included under the term unregistered company, may be wound up under this Act."

On the 13th of November, 1893, an order was made in the

(1) 20 Ch. D. 137.

C. A. 1895

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winding-up under sect. 203 of the same Act, vesting all the property of the society in the Official Receiver and Liquidator.

The purchaser objected to the title on the ground that the county court judge had no jurisdiction to wind up the society, there not being at the date of the order more than seven members of the society. A summons was accordingly taken out under the *Vendor and Purchaser Act* to determine this question.

The Official Liquidator, in his affidavit, stated that the persons who were, in his opinion, members of the society at the date of the presentation of the petition and of the order for winding-up were four persons whom he named, who were then living, and the executors of three other members who were dead, and the trustee in bankruptcy of another who had become bankrupt. There were also some other persons who had been members but had retired.

The society comprised both borrowing and investing members, but there was no definition of a member in the rules of the society.

By the 1st rule the object of the society was stated to be for the purpose of raising by weekly or monthly subscriptions of the several members a fund to enable each member to receive out of the funds of the society the amount or value of his share, to erect or purchase one or more dwelling-house or dwelling-houses, to be secured by mortgage to the society until the amount of his or her shares should have been fully repaid to the society with all fines and other payments in respect thereof.

Rule 33 was as follows:—

"Upon the death of any member of the society holding shares upon which no advance shall have been made, his legal personal representative shall within one month thereof give notice in writing to the manager stating the Christian and surname, place of abode, and profession or business of such legal personal representative, in order that such shares shall be registered in the name of such legal personal representative, or of such other person or persons entitled thereto as he or she shall by such notice direct; and shall also at the same time produce to the manager the probate of the will or letters of administration of such deceased member, or in default thereof he shall pay a fine

of one shilling per share to the society; and upon such notice being given the shares of such deceased member shall be transferred into the name of such legal personal representative, or into the name of such other person or persons entitled thereto as such representative shall direct, and the same fees shall be payable upon such transfer or upon any other transfer of shares; and in case such shares, or any of them, shall not be transferred as aforesaid, at or before the expiration of two months next after the death of such member, a fine of twopence per share shall be paid to the society for every weekly subscription meeting after the expiration of such two months which shall elapse before such transfer shall have been made: Provided always that if no probate of will or letters of administration be so produced within two months after the decease of the shareholder, and the amount due to him shall not exceed £20, then the trustees shall be at liberty at or after the expiration of such two months to pay or distribute the subscriptions paid in by the said shareholder to his widow or children or next of kin, as the trustees shall think fit, subject to any condition for the security of this society as the solicitor may think proper to require from the parties receiving the money."

Rules 35, 41, and 42 regulated the manner in which members might withdraw or be excluded from the society.

Mr. Justice *Stirling* held that under the circumstances there were not more than seven members within the meaning of sect. 199 of the *Companies Act*, 1862, and that the county court judge had no jurisdiction to make the order for winding-up.

The Official Liquidator appealed.

Buckley, Q.C., and *Percy Wheeler*, for the Appellant:—

By the *Companies (Winding-up) Act*, 1890 (53 & 54 Vict. c. 63) s. 1, sub-s. 3, the county court is the proper Court in which a winding-up order of the society should be made, and the order for winding-up made by the judge is conclusive and binding upon all persons until it is set aside on appeal. It is equivalent to a judgment *in rem*: *In re Padstow Total Loss and Collision Assurance Association* (1). But if the purchaser is at liberty to

(1) 20 Ch. D. 137, 145.

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dispute the validity of the winding-up order, he has no ground for doing so. Although there were only four actual members at the time of the winding-up, there were executors and administrators of three more, and the trustee in bankruptcy of an eighth. The members of an unregistered company are in the position of partners, and their representatives remain liable for the debts of the company. They are liable to be placed on the list of contributories. Such persons are members within the meaning of the 199th section. "Member" is not a technical word: a member need not be a shareholder; it is sufficient if he has an interest in the assets and is liable to the creditors. The same argument applies to bankrupt members: *In re South London Fish Market Company* (1); *New Zealand Gold Extraction Company* v. *Peacock* (2); *In re Doncaster Permanent Building Society* (3); *In re Sheffield and South Yorkshire Permanent Building Society* (4); *In re Blackburn and District Benefit Building Society* (5); *Part's Case* (6); *Ex parte Blakeley's Executors* (7). The fact that a doubtful point of law has arisen on the title is no reason why the purchaser should not be held to his contract if the Court decides in favour of the vendor: *Alexander* v. *Mills* (8).

Warrington, Q.C., and *Dibdin*, for the purchaser:—

The winding-up order may be binding between the company and its members, but it is a judgment *in personam* and cannot bind outside persons, such as creditors or purchasers.

The past members and the representatives of the deceased and bankrupt members are not members within the meaning of the 199th section. It is true that there is no definition of members in the rules; but it is clear from the rules, especially rules 1, 35, 41, and 42, that they were to be persons who were actually taking part in carrying on the business of the society. And rule 33, which refers to the death of members, shews that the representatives of deceased members did not become members till they had accepted a transfer of the shares, and if they did

(1) 39 Ch. D. 324, 335.
(2) [1894] 1 Q. B. 622.
(3) Law Rep. 3 Eq. 158.
(4) 22 Q. B. D. 470.
(5) 24 Ch. D. 421, 437.
(6) Law Rep. 10 Eq. 622.
(7) 3 Mac. & G. 726.
(8) Law Rep. 6 Ch. 124.

not do so the value of the shares might be paid to the next of kin. They cannot be made members against their will: *In re Bolton Benefit Loan Society* (1). Those members who have withdrawn are not liable to the debts of the company: *In re West Riding of Yorkshire Permanent Benefit Building Society* (2). And even if they might be made contributories under the winding-up, that does not make them members within the meaning of the 199th section.

[LINDLEY L.J.:—Might they not be members for the purpose of the winding-up only?]

Such a construction would render the section nugatory, for it would be impossible for an outside creditor to know what past members or representatives of deceased members were liable to be made contributories; he could only know of the members on the register, and if there were no more than seven he could not support his petition.

Percy Wheeler, in reply.

LORD HALSBURY:—

I am of opinion that this appeal ought to be dismissed with costs. I look upon the 199th section of the *Companies Act*, 1862, as having enacted something which there must be in order to start this machinery of winding-up, namely, the required number, that is exceeding seven, of persons who are actually members. I think that the language is susceptible of no other construction. The statute itself draws a distinction between past members, who may be contributories, and actual members. I cannot give a construction to the statute which would call upon me to import into the section the words, "Members who are either now or have at one time been members." It is therefore to my mind impossible to give the construction contended for to the 199th section. That leads me to consider what is the effect of the order that has been made for winding-up, and which in some senses may be said to have been *res judicata*. I should think it probable that the order appealed against is binding

(1) 12 Ch. D. 679. (2) 45 Ch. D. 463.

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on the association as an association, and on everybody claiming under it or taking a title under it, but I cannot agree that it is binding or incapable of being challenged by persons who have rights outside it, and therefore I think it cannot be considered a judgment *in rem* for all time and as against all persons. If it can be challenged by an outside person, of course that is conclusive against the present objection. At the same time, I do not desire to be understood to say that if I had come to a different conclusion all the difficulty would be removed. In a case of this sort, bristling with difficulties, I should be very sorry to force the title upon an unwilling purchaser. What would happen if the purchaser wanted to raise money on such a title as this? I know full well the practical answer of a man of business would be that he would not look at property with such a title. Therefore, I am of my opinion that the judgment of Mr. Justice *Stirling* is right, and that this appeal ought to be dismissed with costs.

LINDLEY L.J.:—

I am of the same opinion. This case has raised questions of some importance, and I will deal with those which are really material to the decision of the appeal. In form the question is whether the liquidator of this company can make a good title to some land which has been purported to be vested in him under sect. 203 of the *Companies Act*, 1862. That will depend on whether this company is one which could be properly wound up under sect. 199. The liquidator's case is this: the company has been ordered to be wound up, he has been appointed its liquidator, and an order has been made under sect. 203 vesting in him the property of the company which is held by trustees for the company. By the direction of the Court he has put this property up to sale, and the purchaser declines to complete, because he is not satisfied that he will get a good title; and when I look into it I am not satisfied that he will get a good title—indeed, I think he will get a bad one.

The question turns on the validity of the winding-up order. If that is right no one quarrels with the appointment of the liquidator, or with the vesting order made under sect. 203. The

validity of the winding-up order depends on the jurisdiction of the Court to make it. The company itself, that is the *Leeds and Yorkshire Permanent Benefit Building Society*, came into existence in 1851 under the provisions of the then *Building Societies Act* (6 & 7 Will. 4, c. 32). That has been repealed by a subsequent Act passed in 1874. The society never was registered under the *Companies Act*, 1862, or any part of it, but a petition to wind up was presented under sect. 199. It is that section which gave the county court—the county court being the proper Court in cases of building societies—jurisdiction to make a winding-up order. Sect. 199 runs thus: "Subject as hereinafter mentioned, any partnership, association, or company, except railway companies incorporated by Act of Parliament, consisting of more than seven members and not registered under this Act, and hereinafter included under the term unregistered company, may be wound up under this Act." What, then, are the conditions which must be complied with in order to give the Court jurisdiction to wind up what is here called an unregistered company? It must be some partnership association or company "consisting of more than seven members." What does that mean? Consisting when? It seems to me that the only interpretation can be "consisting of more than seven members at the time of the winding-up." I threw out in the course of the argument a suggestion that the words might have a wider meaning, but I do not think, for a reason I will give presently, that they can. What is the meaning of "members"? The word must be applicable to all partnerships or associations except railway companies which are not registered under this Act. The statute gives no definition of "members" applicable to all the various kinds of societies to be wound up under this Act; and that is what Lord Justice *Cotton* meant in the passage which has been referred to in *In re South London Fish Market Company* (1). "Members" do not mean necessarily "shareholders." But, when you come to look at each particular company, you must look at the constitution of that company, and see what constitutes membership in it. You must look at the rules of the company. The *Building Societies Act* of Will. 4 does not throw any light upon it. Building

(1) 39 Ch. D. 335.

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society rules are not very intelligible as they are usually framed, and it is not very easy to find out what constitutes a member of a particular society; but if you look at the rules of this society member means a person who subscribes to the funds of the association, and who is admitted a member on the payment of a certain fee, and every member who pays his fees is entitled to a share. Now, did this society then consist of seven members when this winding-up happened? The answer to that is unquestionably No. It had a few members, but a very few members. It had had a great many past members, and it had some deceased members, and, as the evidence stood before Mr. Justice *Stirling*, what appeared was this—there were four existing members, and some deceased members, and a bankrupt member. The purchaser contends that that will not do. He says that the executor of a deceased member is not a member. That is perfectly correct. You cannot look upon the executors and administrators of a deceased member as being "members" unless they become such. They may be sued in their representative character in respect of the obligations of the deceased; but executors and administrators will not become members of such a society without doing something to make them members. Then is a trustee of a bankrupt member a member? Not at all. It is altogether wrong in point of law, and it would be most disastrous as a matter of business if it were so. That being so, a supplemental affidavit is put in to suggest this—"We make out that there were seven members, because there are four existing members and a good many past members." Where are the past members? It was the consideration of that question which induced me to suggest that they might be members for the purpose of the winding-up. Mr. *Dibdin* has answered the suggestion by shewing the inconvenience there would be about it. How are you to find out past members before you obtain a winding-up order? You have to find out whether there are seven or more members. Any one who presents a petition to wind up must find that out if he is proceeding under Part VIII. of the Act; but if he is going to embark in an investigation of how many deceased members there are, and how many past members there are, it is a thing which he cannot accomplish. The conclusion at which I have arrived is that

which was entertained by the Master of the Rolls in *In re Bolton Benefit Loan Society* (1), and by the Court of Appeal in *In re South London Fish Market Company* (2). I can, therefore, see no jurisdiction to make the order. That raises another question. Is the order a binding order on every one as long as it lasts? If it is, that will enable the liquidator to go on. I cannot find a reason for saying so. There are some expressions of the present Master of the Rolls (then Lord Justice *Brett*) in the case of *In re Padstow Total Loss and Collision Assurance Association* (3), which I will read: "In this case an order has been made to wind up an association or company as such. That order was the order of a superior Court, which superior Court has jurisdiction in a certain given state of facts to make a winding-up order, and if there has been a mistake made it is a mistake as to the facts of the particular case and not the assumption of a jurisdiction which the Court had not. I am inclined, therefore, to say that this order could never so long as it existed be treated either by the Court that made it or by any other Court as a nullity, and that the only way of getting rid of it was by appeal." I have read that passage, because I think that it is the strongest expression of opinion that can be found in the books to the effect that a winding-up order can only be disputed on appeal. Now, the Court in deciding that case was dealing with an appeal from a winding-up order, and it was an appeal by a contributory. It was a case of one of those illegal companies which being illegal there was no jurisdiction to wind up; and the winding-up order having been made, what I think the present Master of the Rolls must have meant was that until the order was set aside on appeal the company could not be prejudiced, nor could any person paying under it. I do not think he could have intended to go the length of saying that any person who was no party to the litigation at all, and was not claiming through the company at all, was to be bound by a winding-up order being made which there was no jurisdiction to make. A purchaser cannot be bound at all unless an erroneous winding-up order is a judgment *in rem*, made by a Court having jurisdiction to make it. I do not think

(1) 12 Ch. D. 679. (2) 39 Ch. D. 324.
(3) 20 Ch. D. 137, 145.

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the Master of the Rolls thought that a winding-up order was a judgment *in rem*. I allude to that because it is very important, for if the liquidator made out that this was unimpeachable he would make out a perfectly good title. But in my opinion a purchaser is entitled to look into the order and see whether it was properly made. If he can shew that the order has been made by a Court which has no jurisdiction to make it, or that the order is invalid because the company is one to which the winding-up proceedings were inapplicable, he cuts away the title of the liquidator who claims under it. The consequence is that this appeal must be dismissed. It is unfortunate, because I can see very well the consequences if this winding-up order is not a valid order. There appears to be a defect in the statute which I confess I had not seen before. Where there has been a large society reduced to a few members, and not registered, the society cannot be wound up; and those persons who are compelled to pay must take what steps they can to get contribution from others. No doubt the scheme of the Act was intended to get rid of the very great inconvenience arising from such a course. I think this case has disclosed a blot, and a blot which is new to me. I think the true construction of the 199th section is what I have mentioned, and that this order is invalid and can be impeached by a purchaser when objecting to it, and that no title can be made by the liquidator.

A. L. SMITH L.J.:—

In this case the real question depends upon the true construction of sect. 199 of the Act of 1862. The point may be very shortly stated. The words are these: "any partnership association or company consisting of more than seven members may be wound up." What is the meaning of that? Does it mean that any partnership association or company consisting of more than seven persons who may at one time have been shareholders but have withdrawn and are still liable as contributories? Or does it mean, any company consisting of seven members who are actually members at the time when the winding-up order is sought to be obtained? If this section had stood alone, I do not say that I should have thought it plain that it could not

mean a society consisting of more than seven persons who at one time were members and may be contributories, and that it must mean seven persons at the date of the winding-up. But this section does not stand alone, because, if you look at sect. 48 of the Act, and if you turn to sect. 79 and again to sect. 199, it seems to me that one and all point to the fact of there being the requisite number of actual members at the respective periods therein mentioned; as regards sect. 48 and 79, of there being less than seven members, that is actual members, at the time to which the sections point; and in sect. 199 to there being more than seven members at the time which is therein mentioned. It seems to me, therefore, that as regards the construction of sect. 199 the matter is clear. That carries me on to the question about executors and administrators, or trustees in bankruptcy. In my judgment, for the reasons which have been given, and especially looking to sect. 48—for if the construction which is contended for by the Appellant here is to include trustees and executors, the words in sect. 48 must bear a different construction to that which they bear in sect. 199—I am of opinion that this order was made by the learned county court judge without jurisdiction, and that on the true construction of the section there were not more than seven members. But then it is said that the winding-up order is a judgment against all the world. It may be that it is a judgment binding on those who were members of the company, and the company itself, but it is not a judgment binding on a person who is a stranger and who is now objecting to have a title forced upon him through an order which the Court holds to be invalid and made without jurisdiction. In my opinion, it does not bind the purchaser at all; and under those circumstances the purchaser is entitled to take the objection which he does. Therefore, the judgment of Mr. Justice *Stirling* must be affirmed, and the appeal dismissed with costs.

Solicitors: *A. Scott Lawson*, agent for *E. M. Jones, Son, & Tannett, Leeds; Vincent & Vincent*, agents for *Middleton & Sons, Leeds.*

M. W.

C. A.
1895
Feb. 27, 28; March 14.

In re GEORGE NEWMAN & CO.

[C0146 of 1892.]

Company—Winding-up—Director—Misfeasance—Misapplication of Assets of Company—Presents to Directors—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

Directors cannot pay themselves for their services, or make presents to themselves out of the company's assets, unless authorized so to do by the instrument which regulates the company, or by the shareholders at a properly convened meeting.

N., the chairman of a company in which substantially all the shares were held by himself and his family, purchased on behalf of the company the right to a building agreement to be obtained from certain commissioners. The commissioners objected to the company as tenant, and proposed to substitute *N.*, who thereupon sold the benefit of the agreement to the company at an advance of £10,000, of which £7000 was spent upon commissions and otherwise in order to obtain the agreement from the commissioners, and £3000 was applied by *N.* to his own use. A further sum of £3500 was spent by *N.* out of the assets of the company upon his private house. These payments were made out of money borrowed by the company for the purpose of its business; they were sanctioned by resolutions of the directors, and were approved of by all the shareholders. The articles contained no power to make presents to directors.

Upon a summons taken out by the liquidator in the winding-up of the company against *N.* under sect. 10 of the *Companies (Winding-up) Act*, 1890:—

Held, that *N.* was not liable for the £7000, but was liable for the £3000 and the £3500, first, because the shareholders for the time being had no power to authorize the making of presents to directors out of money borrowed by the company; secondly, because if there had been such power it could be exercised only at a general meeting.

THIS was an appeal from a decision of Mr. Justice *Vaughan Williams*.

The Official Receiver and liquidator took out a summons in the winding-up of the above-named company under sect. 10 of the *Companies (Winding-up) Act*, 1890, asking for a declaration that *George Newman*, the chairman of the company, was liable to contribute to the assets of the company (*a*) the sum of £10,000, alleged to be a profit or commission improperly made or retained

by him upon the purchase by the company of a certain building agreement relating to land in the rear of the *Albert Hall*; (*b*) the sum of £2500, being the amount of a cheque drawn by the *Liberator Permanent Benefit Building Society* in favour of the company, and alleged to have been converted by *George Newman* to his own use; (*c*) two sums amounting to £3496 18*s.* 4*d.*, alleged to have been expended by *George Newman* out of the assets of the company in improving his private residence, with interest thereon at 5 per cent.

The summons was based upon a report made by the Official Receiver and liquidator under the Act of 1890.

George Newman & Co., Limited, was one of the group of companies formed in connection with the notorious *Liberator Permanent Benefit Building Society*. The company was formed in January, 1886, under articles of association made between *George Newman*, a builder, of the one part, a Mr. *Bromham* of the second part, and the several persons who had executed, or should thereafter execute, the said articles of the third part, and the company was registered under Part VII. of the *Companies Act*, 1862, as an existing company governed by these articles. Why the company was not formed and registered under Part I. of the *Companies Act*, 1862, did not appear. Seven persons executed the articles as parties of the third part. Four of them were brothers of *George Newman*; another was a builder named *Morgan*; and the seventh was a clerk named *Shotter*. All of them signed in respect of one share each.

The articles, so far as material, were to the following effect:—

Article 3 stated the objects of the company. The first object was declared to be to carry on the business of builder and contractor in all its branches, and also all ancillary businesses. This general description was followed by a long enumeration of other objects in order to enable the company to do anything connected with land and buildings. Amongst the enumerated objects were buying and taking on lease any land or buildings; building operations of every description; lending money with or without security; making arrangements for sharing profits with other persons or companies and financing them; borrowing money; selling, leasing, mortgaging, or otherwise turning to account

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any property of the company. Article 4 declared the nominal capital to be £50,000, divided into 5000 shares of £10 each. Article 5 provided that *George Newman* should be entitled to 2500 shares, and each of the parties of the third part to the number opposite his name (*i.e.*, one share each). By article 6 these shares were to be treated as fully paid up in consideration of the transfer to the company of certain assets of *George Newman*, which consisted of his building property and the goodwill of his business, which the company was to take over with its debts and liabilities. By article 13 the conduct of the company's business was exclusively vested in the directors. Article 25 authorized members to transfer their shares to children and others. Article 26 gave the directors power to refuse to register certain transfers, but not any made under article 25, or by *George Newman*. Article 32 provided for the transfer of shares of members who were infants, lunatics, dead, or bankrupt. Articles 51 to 54 related to borrowing, and power was given to the directors to borrow from themselves. Articles 55 to 61 provided for holding general meetings of the shareholders. By article 73 guardians might vote for infant shareholders. By article 80 the number of directors was to be not more than seven, and the first directors were *George Newman*, *William Newman*, and *H. G. Wright*. By article 82 their remuneration was to be determined by the company in general meeting. By article 87 no director was to be disqualified from contracting with the company, nor was any director making any profit out of any contract with the company to be liable to account to the company for such profit by reason only of his office or fiduciary relation. By article 88 the directors might appoint one of their body a managing director, and by article 90 might fix his remuneration by way of salary, commission, or a share of profits. By articles 102 and 103 the management of the business and the control of the company were vested in the directors, and amongst other powers specially enumerated were powers to acquire for the company any property on any terms they thought fit, to pay for any services rendered to the company, to give any officer or other person employed by the company a commission on the profits of any transaction, and to

pay commissions and to make allowances to any persons introducing business to the company or otherwise promoting the business thereof. Article 141 was a general indemnity clause in favour of directors and other officers for what they might do on behalf of the company.

It appeared from the evidence before the Court that there never were more than fourteen shareholders in this company—namely, *George Newman* and five brothers and six sons of his, all of whom were infants, and *Shotter* and *Morgan*. There never were more than 2500 shares, which were issued to *George Newman* as fully paid up under article 5. He distributed 1831 of these amongst his brothers and sons and *Shotter* and *Morgan*, each of these two last-named persons having one each. The directors of the company were *George Newman* and his brothers, *William*, *Charles*, *Daniel*, and *John Henry*, and *H. G. Wright*. The business of the company was transacted by these persons. Debts were contracted to a large amount; no profits were ever made. The company was ordered to be wound up in November, 1892, and it was then found that the assets of the company were practically *nil*, whilst the debts and liabilities of the company amounted to £88,000 in respect of money borrowed from the *Liberator Building Society* and other companies connected with it. The company never had any assets except those taken over from *George Newman* and such as were acquired with borrowed money.

With regard to the £10,000, the facts found by the Court of Appeal were as follows: The Commissioners of the Exhibition of 1851 had some land near the *Albert Hall*, and in 1890 they agreed with *William Sarl* for the erection of buildings on this land and for granting leases of the buildings when erected. This agreement imposed heavy liabilities on the builder; but the ground-rents were at first nominal, although ultimately they were to be £8000 a year. The agreement, however, was so beneficial to *Sarl* that he agreed to sell the benefit of it to *George Newman* for £16,000, and *George Newman* got £26,000 for it from the company. The company paid him £26,000 for it out of money borrowed by the company for the purpose, and the difference between this sum and the £16,000 paid for it

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by *Newman* to *Sarl* was the £10,000 which the liquidator sought to recover. The mode in which this transaction was carried out was as follows: *George Newman* was to obtain the benefit of *Sarl's* agreement for the company; but *Sarl* had not got any formal agreement which he could assign, and the Commissioners would not enter into any agreement with the company. It was therefore agreed that *George Newman* should himself enter into a formal agreement with the Commissioners. On the 3rd of December, 1889, *George Newman* wrote a letter to the *Liberator Society* informing them that the company had resolved to take over the agreement, and asking for an advance on its security, which the *Liberator Society* afterwards agreed to make and did make. On the 6th of December, 1889, the directors met and discussed the matter, and resolved to buy the agreement from *George Newman* for £26,000 and to pay the Commissioners £7500 for rent in advance, and to indemnify *George Newman* from all liability under the agreement. On the 18th of December, 1889, the building agreement was executed by *Newman*, and the Commissioners and *Newman* then paid *Sarl's* solicitor, Mr. *R. B. Johnson*, £16,000, as agreed, and he also paid £7500 to the Commissioners, to their solicitors, for rent in advance. This completed the matter so far as *Sarl* and the Commissioners were concerned. These moneys were paid by means of cash and bills supplied by the company, and *George Newman* was therefore a mere trustee of this agreement for the company. On the 18th of December, 1889, another instrument was executed by *George Newman* and the company by which *George Newman* assigned the benefit of the agreement to the company for £26,000, and the company agreed to indemnify him from all liabilities under the same. £10,000, being the difference between the price paid to *Sarl* and that paid by the company, was thus obtained by *George Newman* from the company. In order to obtain this agreement for the company *George Newman* had to pay and did pay large sums of money for commissions, introductions, and other matters, and only £3000 out of the £10,000 was in fact got by him out of the transaction. The directors knew that large sums beyond the £16,000 payable to *Sarl* would have to be paid in order to

obtain the agreement, and they gave *George Newman* £10,000 to cover whatever might have to be paid for that purpose, with liberty to retain what he could for himself.

With regard to the £2500, the report stated that, on the 12th of June, 1891, the *Liberator Society* gave to the company a cheque for £2500 on account of advances which the society had agreed to make on the security of the building agreement relating to the *Albert Hall* estate; that the cheque was indorsed by *George Newman* and handed to *Wright*, by whom it was misappropriated; and that *Newman* then directed the secretary of the company to write off the amount to an account called "Fees Account," which he did. The account of this transaction given by *Newman* and accepted by the Court was to the effect that the cheque had been left by him with *Wright*, who was the financial agent of the *Liberator Society* as well as the solicitor of *George Newman & Co.*, in order that the amount of the cheque might be indorsed on the mortgage to the *Liberator Society*, after which it was to be paid into the bank of *George Newman & Co.*, to be credited to the company's account; that, on finding that the cheque had not been paid into the bank, he made repeated inquiries of *Wright* with regard to it, and was ultimately informed by him that the money had been applied for the purposes of *Jabez Balfour*; that, inasmuch as *Balfour* was at the head of a group of companies who had undertaken to finance the present company in its building transactions, it was impossible to take proceedings against him for the recovery of the money; and that it was, therefore, determined by the directors to consider the amount as paid to *Balfour* for services rendered by him to the company.

With regard to the expenditure upon *Newman's* private residence, the report extracted the following statement from the minutes of the company: "The chairman reported that the company had done considerable works during the last six months, incurring a large outlay, in altering and adapting his private residence, and suggested that, as such alterations were considered by him necessary to maintain the social position held by him as chairman of this company and having regard to the many important operations now being conducted by this company

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entailing upon him constant and assiduous attention, it would not be unreasonable for the expenditure above referred to to be treated as a proper expenditure of the company for its purposes. Thereupon it was unanimously resolved that the cost of the works at *North End Lodge, Croydon,* be debited to the separate account of the chairman, and liquidated by a credit entry authorized by this resolution." The report further stated that, in pursuance of this resolution, *George Newman* was debited with two sums of £3292 16*s.* 11*d.* and £204 1*s.* 5*d.*, which sums were liquidated by a credit entry of £3496 18*s.* 4*d.*, charged to the revenue account for 1891 under the head of "Purchase of plant and building material." *Newman* did not offer any explanation of this payment beyond that appearing on the face of the resolution.

The whole of these transactions were entered into with the knowledge and approval of all the shareholders.

Mr. Justice *Vaughan Williams,* having regard to the peculiar constitution of the company and to the fact that throughout the transactions complained of there had been no concealment from the shareholders, held that the case fell within the principle of *In re British Seamless Paper Box Company* (1), and that the application of the liquidator failed, and he dismissed the summons accordingly. The liquidator appealed.

Theobald, for the liquidator:—

The misapplication of the £2500 was an *ultra vires* act, and even the consent of all the shareholders could not render it lawful.

In re British Seamless Paper Box Company is distinguishable.

[Lord Halsbury referred to *Society of Practical Knowledge* v. *Abbott* (2); *In re Crenver and Wheal Abraham United Mining Company* (3).]

The expenditure of £3496 upon *Newman's* house was also *ultra vires,* and the shareholders did not sanction it. In fact some of the shareholders were infants, and in no event could their sanction be of any avail. The learned Judge seems to have

(1) 17 Ch. D. 467. (2) 2 Beav. 559.
(3) Law Rep. 8 Ch. 45.

thought that the shares which stood in the names of the infants were really their father's shares, and that his sanction was sufficient, the shares being also fully paid. But in *Cox's Case* (1), on which he relied, a liability was imposed upon a person who, for the purpose of deluding the public, had had shares registered in the names of mere nominees for him, and in *In re British Seamless Paper Box Company* (2) every one had acted honestly, and a general meeting of the company had approved what had been done. In the present case the transaction was dishonest from beginning to end.

The manner in which the sum of £10,000 has been applied has never been satisfactorily explained. There is no doubt that there was an agreement to purchase *Sarl's* contract for £16,000, and that *Newman* received £26,000 before the business was conveyed to the company. The difference went into *Newman's* pocket, or was spent in a way which brought no benefit to the company.

Dunham, and *Johnston Edwards*, for *George Newman*:—

The Official Receiver and liquidator has no higher right to take proceedings against a director for breach of duty than the company had: *Coventry and Dixon's Case* (3). He must, therefore, shew that *Newman* has been guilty of misfeasance for which he could have been called to account by the company before it was wound up; and further, that the company had not sanctioned his acts.

With respect to the sum of £10,000, it was given to *Newman* in order to enable him to carry through the purchase of *Sarl's* building agreement. The greater part of it was spent in this way, whether in bribery, as has been alleged, or not makes no difference, for it was spent in the interest of the company. Even as regards the £3000 retained by *Newman* for himself, the company is not entitled to have the money refunded as being a secret profit, for there was no secrecy, and the contract to sell the contract to the company was entered into by the governing body of the company.

(1) 4 D. J. & S. 53. (2) 17 Ch. D. 467.
(3) 14 Ch. D. 660.

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With respect to the cheque for £2500, there is no evidence that it was appropriated by *George Newman*; on the contrary, it is clear that he entrusted it to *Wright* to be paid into the bank and he applied it to his own use.

The sum of £3496 was, no doubt, spent by *Newman* on his own home; but it was within the powers of the directors to vote this sum. At that time the company was carrying on an extensive business, and it was considered necessary that *Newman* should live in a certain style and exercise hospitality for the benefit of the company. Directors have always power to make presents and confer pensions, if by so doing they can further the interests of the company.

But even if any of these transactions were *ultra vires*, the company cannot complain of them, as it acquiesced in them. It was, in fact, a private company, consisting only of *Newman* and his nominees. All the shareholders sanctioned the expenditure except the infant members, and they were represented by *Newman*, their father, as provided by art. 73 of the articles of association. The case is within the principle of *In re British Seamless Paper Box Company* (1).

Theobald, in reply.

Cur. adv. vult.

March 14. LINDLEY L.J. delivered the judgment of the Court (Lord *Halsbury*, *Lindley* L.J., and *A. L. Smith* L.J.):—

This is an appeal from the refusal of Mr. Justice *Vaughan Williams* to make an order under sect. 10 of the *Companies (Winding-up) Act*, 1890, for the payment by Mr. *George Newman* of certain sums of money to the liquidator of the above-named company. [The Lord Justice stated the constitution and history of the society as above set out, and continued:—]

Such being a short account of the company, it is necessary to allude to the circumstances which give rise to the present application on the part of the liquidator. He seeks to obtain an order for the payment by *George Newman* of three sums of money

(1) 17 Ch. D. 467.

—namely, (1.) £10,000 in respect of what is called the *Albert Hall* purchase; (2.) £2500 in respect of what is called the *Albert Hall* advances; (3.) £3500 in respect of money of the company expended in *George Newman's* own house. [The Lord Justice stated the facts relating to the £10,000, and continued:—]

The question arises whether the company can now by its liquidator recover this sum of £10,000, or any part of it, from *George Newman*. Mr. Justice *Vaughan Williams* has decided this question against the company, and as regards everything except the £3000 profit actually made by *George Newman* the learned Judge was correct. Except as to that sum the evidence is not sufficient to prove any misapplication of the company's assets. The money spent appears to have been part of the cost of acquiring the contract, and that expenditure having been necessary for its acquisition and authorized by the directors, the company cannot treat it as a misapplication of its assets. It was suggested that the money went in bribes, and that the expenditure was therefore *ultra vires*; but, although this suggestion may be true, there is no proof of it on which the Court can judicially act. It must be taken that the company acquired the benefit of the contract on certain terms which, as regards the sums expended, are not shewn to have involved a breach of trust, and it would not be just to compel Mr. *George Newman* to repay more than the £3000 which he actually retained for his own benefit. Whether he can be made to account for this sum is another matter, which will be examined later on.

The £2500 is claimed as the amount of a cheque belonging to the company, and improperly given by *George Newman* to *Wright* and applied by him for his own purposes with the knowledge and consent of *George Newman*. [The Lord Justice stated the facts relating to this sum, and continued:—] Under these circumstances, *George Newman* cannot be charged with this sum. When he found that the cheque had been misapplied, he did not know what to do, and, although he ultimately told the secretary to write the amount off and put it to the fees account, it would not be just to infer from this that *George Newman* sanctioned or approved of what had been done. No part of this sum ever came to *Newman*; he is in no way benefited by the

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misapplication of the cheque, and on the evidence *Wright* or *Jabez Balfour*, and not *Newman*, is responsible for the loss of this cheque.

The last sum claimed by the liquidator is £3500. The facts relating to this are correctly set out in his report, and are not contradicted or explained. *George Newman* applied assets of the company to this amount in decorating his own house, and the directors afterwards resolved that no charge should be made for it, and it was accordingly written off.

In answer to the liquidator's claim for this sum, and in answer to his claim to the £3000 already referred to, Mr. *George Newman* relies on the articles of the company and on the fact that all the directors and shareholders knew and sanctioned what was done. It remains to consider this defence with reference to both of these sums. When the facts are understood both these sums were in truth presents by the directors out of the company's assets to *G. Newman* with the consent of the other shareholders who were of age; and the question is whether these presents can be treated as valid against the liquidator on the winding-up of the company, which is hopelessly insolvent and which was largely in debt when these presents were made. Mr. Justice *Vaughan Williams* has held that they are unimpeachable, and he referred to the case of *In re British Seamless Paper Box Company* (1) as supporting his view. But that case is very unlike this. The directors there had allotted shares to some of themselves as fully paid up. The shares were, in fact, allotted in consideration of some patents taken over by the company; and an agreement to issue the shares as paid up was registered. The transaction, therefore, was *intra vires*, and it was taken to be so both by counsel and by the Court. Further, the transaction was perfectly honest throughout, and it was sanctioned by a general meeting of the company, which then consisted of only the directors and one other person, who assented to what was done. More than a year afterwards shares were issued to other people, and, the company being ultimately wound up, the liquidator sought to recover the nominal value of the shares, treating them, in fact, as not paid up. The Court held that this could not be done, because the

(1) 17 Ch. D. 467.

transaction (being *intra vires*) was honest and was sanctioned by all the members of the company at the time. But in this case the presents made by the directors to Mr. *Newman*, their chairman, were made out of money borrowed by the company for the purposes of its business; and this money the directors had no right to apply in making presents to one of themselves. The transaction was a breach of trust by the whole of them; and even if all the shareholders could have sanctioned it, they never did so in such a way as to bind the company. It is true that this company was a small one, and is what is called a private company; but its corporate capacity cannot be ignored. Those who form such companies obtain great advantages, but accompanied by some disadvantages. A registered company cannot do anything which all its members think expedient, and which, apart from the law relating to incorporated companies, they might lawfully do. An incorporated company's assets are its property and not the property of the shareholders for the time being; and, if the directors misapply those assets by applying them to purposes for which they cannot be lawfully applied by the company itself, the company can make them liable for such misapplication as soon as any one properly sets the company in motion. All this is familiar law and must be borne in mind in deciding the present case. Mr. *George Newman* and his co-directors evidently ignored their legal position entirely. They regarded Mr. *George Newman* as the company, and it never seems to have occurred to them that he and his brothers could not do as they liked with what they regarded as their own property, or rather as his, for he and his children held the bulk of the shares. If this view were correct in point of law, if the corporate body could be disregarded, it would follow that Mr. *George Newman* and his brothers would be liable without limit for the debts which were contracted in the name of the company. This would be a just and proper result to arrive at; but the Court is precluded by the terms of the *Companies Act*, 1862, ss. 191, 192, from adopting it. The Court is bound to recognise the company as incorporated, and to give effect to all the consequences of such incorporation. What, then, are the consequences as regards presents to directors? The cases on the subject are few. The law will be found discussed in *York and*

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North Midland Railway Company v. *Hudson* (1) and *Hutton* v. *West Cork Railway Company* (2), but there is no case which quite covers this. Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorized so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting. The shareholders, at a meeting duly convened for the purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such a matter as this. But to make presents out of profits is one thing and to make them out of capital or out of money borrowed by the company is a very different matter. Such money cannot be lawfully divided amongst the shareholders themselves, nor can it be given away by them for nothing to their directors so as to bind the company in its corporate capacity. But even if the shareholders in general meeting could have sanctioned the making of these presents, no general meeting to consider the subject was ever held. It may be true, and probably is true, that a meeting, if held, would have done anything which Mr. *George Newman* desired; but this is pure speculation, and the liquidator, as representing the company in its corporate capacity, is entitled to insist upon and to have the benefit of the fact that even if a general meeting could have sanctioned what was done, such sanction was never obtained. Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly convened meeting, and by a resolution properly considered and carried and duly recorded. The articles of this company, wide as they are, do not authorize such presents as those impeached by the liquidator; and the result is that his appeal must be allowed as to £3000, part of the £10,000, and as to the £3500,

(1) 16 Beav. 485. (2) 23 Ch. D. 654.

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and Mr. *Newman* must be ordered to pay these sums, with interest at 4 per cent. He ought also to pay the costs of the appeal and the costs of the summons, except so far as they have been increased by the claims to the £2500 and to the £7000, part of the £10,000. The costs occasioned by these claims ought to be allowed and be set off against those which he is ordered to pay.

Solicitors for the Appellant: *Thorne & Welsford.*
Solicitor for the Respondent: *W. Brookes Palmer.*

H. C. J.

In re DEELEY'S PATENT.

C. A. 1895 *March* 15, 18, 21, 22; *April* 5.

Patent—Validity—Infringement—Revocation—Estoppel—Patents, &c., Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 26.

In an action for infringement of a patent, the Court held that one of the claims in the specification had been anticipated, and declared the patent invalid. The Defendant then presented a petition for revocation of the patent:—

Held, that the Plaintiffs were not estopped from setting up the validity of the claim on the petition.

THIS was an appeal from a decision of Mr. Justice *Romer.*

On the 3rd of November, 1884, *J. Deeley*, the younger, took out a patent, No. 14,526 of 1884, for improvements in the extracting mechanism of drop-down small-arms. The invention was intended to be applied to double-barrelled guns, and its object was to eject the spent cartridge or cartridges, leaving any unspent cartridge untouched in its barrel.

In 1891 an action was brought by *John Deeley*, the elder, and *Westley, Richards & Co.*, in whom the patent rights had become vested, against *Thomas Perkes* for infringement.

The action was tried by Lord Justice *Kay*, who held that claim 1 had been anticipated by a prior patent of the Defendant, and that claims 3, 4, and 5 had been anticipated by a gun made by *Rigby* in 1882, and that the Plaintiffs' patent was consequently invalid. This judgment was affirmed by the Court

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of Appeal, where the case was fought and decided exclusively upon claims 3, 4, and 5.

The patentee then applied for and obtained leave to amend his patent by striking out claims 3, 4, and 5, and by adding a disclaiming note whereby he disclaimed any claim to any general mechanism to be found in *Rigby's* gun, and confined the claim to the special form, arrangement, and combination of the parts of the mechanism set forth in claims 1 and 2.

Before leave to amend was granted, the Defendant, having first obtained the fiat of the Attorney-General, presented a petition for revocation of the patent; but the hearing of the petition was adjourned until after the specification had been amended.

At the hearing of the petition the point was taken that the Plaintiffs were estopped by the finding of Lord Justice *Kay* in the action for infringement that claim 1 had been anticipated from again setting up the validity of that claim.

This case is reported only upon that point.

Mr. Justice *Romer* held that claims 1 and 2 had not been substantially altered by the amendments; that claim 1 was anticipated by the Defendant's patent, and that claim 2 was anticipated by *Rigby's* gun; and he ordered the patent to be revoked; but he expressed no opinion upon the question of estoppel.

The Plaintiffs appealed.

Moulton, Q.C., and *Roger Wallace*, for the Appellants.

Sir *R. E. Webster*, Q.C., and *T. Terrell*, for the Respondent, the Petitioner:—

The Appellants are estopped by the judgment of Lord Justice *Kay* in the action for infringement from denying that the first claim has been anticipated. Sect. 26 of the *Patents Act*, 1883, repeals the procedure by *scire facias*, and establishes a new and different procedure for revocation. Under this procedure the Petitioner is a party. The fiat of the Attorney-General is required merely for the purpose of preventing frivolous applications, and in cases falling within clauses *c*, *d*, and *e* of sub-sect. 4 of

sect. 26 it is not required at all. Therefore, the usual principles of estoppel apply. The same issue was raised and decided between the same parties in the action for infringement. The Appellants are, therefore, estopped from raising it again in this proceeding: *Alison's Case* (1); *Priestman* v. *Thomas* (2).

Moulton, in reply:—

If the Legislature had intended to enact that wherever a patent has been declared invalid in an action for infringement the patent shall be revoked, the Act would have contained an express provision to that effect. A petition for revocation is not on all-fours with private litigation. It is as one of Her Majesty's subjects that the Petitioner seeks revocation, and the fact that he has been a defendant in an action for infringement and has obtained a declaration in that action that the patent is invalid is immaterial.

Cur. adv. vult.

April 5. A. L. SMITH L.J. delivered the judgment of the Court (Lord *Halsbury*, *Lindley* L.J., and *A. L. Smith* L.J.), whereby it was held that claim 1 was bad, and that claim 2 was good, and that consequently the specification was invalid until further amended.

The Lord Justice then proceeded as follows:—

A point was taken by Sir *R. Webster* that Lord Justice *Kay's* finding upon the fact that claim 1 of *Deeley's* specification had been anticipated acted as an estoppel in this petition. In the view above taken of the facts it is unnecessary to decide this point, but as it is new and important and has been fully argued and considered, we will give our opinion upon it. We are of opinion that there is no estoppel. A petition to revoke a patent by whomsoever presented is a petition on behalf of the public, and it is not personal to the Petitioner, and in a legal point of view it is a mere accident that in this case the Petitioner was a party to a former litigation. Under the old procedure by *scire facias* it is plain that there would be no estoppel, and although the

(1) Law Rep. 9 Ch. 1, 24. (2) 9 P. D. 70, 210.

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procedure is altered, the principle underlying it and the effect of it are the same, and, as in the case of a *scire facias*, so in this petition there is no estoppel.

Solicitors for the Appellants: *Stibbard, Gibson & Co.*
Solicitors for the Respondent: *Wakeford May & Woulfe.*

H. C. J.

In re FLOATING DOCK COMPANY OF ST. THOMAS, LIMITED.

CHITTY J.

1895

Jan. 12; *Feb.* 13.

Company—Reduction of Capital—Extinguishment of Shares—Confirmation by the Court—Classes of Shareholders—Duties of Directors as to Repairs—Companies Acts, 1867 (30 & 31 *Vict. c.* 131), *s.* 9; *and* 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

Under the *Companies Acts*, 1867 and 1877, the Court has jurisdiction to sanction a special resolution for the reduction of capital no longer represented by available assets cancelling the whole of two out of three classes of shares.

Where there has been a loss of capital and there are first preference, second preference, and ordinary shares, the loss should be made to fall upon that class of shares which according to the constitution of the company is the proper class to bear it.

Duties of directors as to maintaining and repairing the company's property stated.

PETITION by the company for the confirmation by the Court of a special resolution for the reduction of its capital. The only novelty in the application was that the method by which the proposed reduction was to be effected involved the extinguishment of the whole of the second preference and ordinary shares. The material facts were as follows:—

In February, 1864, the *St. Thomas Floating Dock Company, Limited*, was formed, with a capital of £100,000, for the purpose of constructing and working a floating dock, in the harbour of *St. Thomas*, in the *West Indies*, which was completed in July, 1867, at a cost of about £100,000. An accident happened to the dock immediately after its completion by which it was sunk, and it was subsequently further damaged by a violent hurricane.

The original company being unable to raise the dock for want of funds, a second company, the *St. Thomas Dock Company, Limited*, was formed in March, 1869, with a capital of £135,000, for the purpose of taking over the dock from the original company; but this company also proved a failure and was wound up.

In July, 1878, the present company was formed, with a

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nominal capital of £163,618, divided into 46,748 shares of £3 10*s.* each, and the assets of the second company were transferred, under a scheme sanctioned by the Court, to the present company. The nominal capital of the company was divided into £70,994 in first preference shares, £71,823 10*s.* in second preference shares, and £20,800 10*s.* in ordinary shares; and under the scheme sanctioned by the Court the first preference shares went to the first mortgagees of the second company; the second preference shares were allotted to first mortgagees, in respect of overdue interest, and to second mortgagees; and the ordinary shares were allotted to the old shareholders. All the shares were to be deemed fully paid up.

By the articles of association it was provided (100), that the net profits of the company, "after setting apart such sums for repairs and renewals as the directors shall from time to time consider necessary or proper," should be applied in the payment of a dividend of £6 per cent. per annum, contingent on the profits of each year, to the holders of first preference shares; out of the surplus profits (if any) a dividend of £5 per cent., also contingent on the profits of each year, was to be paid to the holders of second preference shares; and the ultimate surplus (if any) was to be paid to the holders of ordinary shares. Article 115 provided, that on a dissolution the assets of the company, "so far as the same will extend, shall be divided among the first preference shareholders, and if any surplus shall remain after payment to them of the nominal amount of their shares, the same shall be divided among the second preference shareholders, and only the ultimate surplus (if any), after paying them the nominal amount of their shares, shall be divided among the ordinary shareholders."

At the time when the company was formed, it was expected and believed, as the result of very careful inquiries, that a large profit could be made from the working of the dock, in consequence of the number of ships that then frequented the harbour of *St. Thomas*, though, except as a means of earning an income, the dock was admittedly not then worth more than half the nominal capital of the company. These expectations were never realized, and except in the year 1882 the dock had never earned

enough to pay the dividend on the first preference shares, for which about £4260 was required.

There was a great deal of evidence, including a report by the directors, to the effect that the dock was now not worth more than £50,000, as it had suffered from storms and natural deterioration; that the trade and shipping at *St. Thomas* had very much decreased, and was steadily decreasing, in consequence of the alteration in the ocean steamer routes, and that owing to this and to the increased size of modern steamships, which were too large for the dock, there was now no chance of the company ever being in a position to earn enough income to pay anything by way of dividend on the second preference and ordinary shares.

By a special resolution of the company, passed on the 18th of October, 1894, and confirmed on the 6th of November following, it was resolved to reduce the capital from £163,618 to £50,710, and that such reduction should be effected by cancelling capital which had been lost, or was not represented by available assets, to the extent of and by the cancellation of the whole of the 5943 ordinary shares of £3 10*s.* each, and the whole of the 20,521 second preference shares of £3 10*s.* each, and £1 per share upon each of the 20,284 first preference shares of £3 10*s.* each, and by reducing the nominal amount of the said first preference shares from £3 10*s.* to £2 10*s.* each.

These resolutions were unanimously passed by all three classes of shareholders present in person or by proxy at the meetings, which were attended by more than three-fourths of the members of each class; but it having been ascertained when the petition was first opened that there were some dissentient second preference shareholders who had not attended the meetings, but who had only written protesting against the scheme of reduction, the hearing of the petition was adjourned, by direction of the Judge, that these dissentient shareholders might be served. Only one, however, appeared upon the hearing of the petition.

Byrne, Q.C., and *Cator*, for the petition:—

The Court has jurisdiction to make such an order as is asked for: *British and American Trustee and Finance Corporation* v.

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Couper (1). The evidence shews that the second preference and ordinary shareholders can never hope for any dividend or any share in the capital. The proposed method of reduction is reasonable; it is not essential that the reduction should be made rateably on all the shares: *In re Barrow Hæmatite Steel Company* (2). Resolutions for the reduction of parts of the capital have been sanctioned: *In re Gatling Gun, Limited* (3); *In re Agricultural Hotel Company* (4). It is only going a step further to wipe out the two classes of shares that can never receive anything, and to reduce the first preference shares.

[*In re Quebrada Railway, Land and Copper Company* (5); *In re American Pastoral Company* (6), and *In re Denver Hotel Company* (7), were also cited.]

The evidence as to the deterioration of the dock shews that the nominal capital is no longer represented by available assets. There is nothing unreasonable or unfair in the proposed reductions, and the company has made out a case for the sanction by the Court of the special resolution.

R. J. Parker, for one of the dissentient shareholders:—

I do not dispute the proposition that the Court has jurisdiction to make this order; but I do say that the scheme is unjust and inequitable, and one which ought not to be sanctioned. The dock never was worth the original amount of capital attributed to it, and a portion of the nominal capital never was represented by available assets. On this ground alone the reduction ought not to be sanctioned: *In re New Chile Gold Mining Company* (8). If it is right to reduce at all, it was equally right in 1878, when the present company was formed.

The report of the directors, issued when this scheme was first promulgated, admits the great deterioration of the dock, and I say that in effect it admits that the directors have not done their duty in maintaining the dock.

If a reduction of capital is to be made, why not do it rateably?

(1) [1894] A. C. 399.
(2) 39 Ch. D. 582.
(3) 43 Ch. D. 628.
(4) [1891] 1 Ch. 396.
(5) 40 Ch. D. 363.
(6) W. N. (1890) 62.
(7) [1893] 1 Ch. 495.
(8) 38 Ch. D. 475.

Why are two classes of shareholders to be entirely wiped out? For these reasons, the special resolutions ought not to be confirmed.

Byrne, in reply.

CHITTY J.:—

No objection has been raised, nor after the decision in the House of Lords in *British and American Trustee and Finance Corporation* v. *Couper* (1) could it have been successfully raised, to the jurisdiction of the Court to make the order asked for. The function of the Court is to see that the proposed reduction is fair and reasonable in the circumstances of the case. The power of confirming, or refusing to confirm, the special resolution of a company to reduce its capital was conferred upon the Court in order to enable it to protect the interest of persons who dissented, or even of persons who did not appear except on the argument and hearing of the petition, as in the present case. It is quite unnecessary for me to refer to the various sections of the two Acts of Parliament that relate to the subject. The reduction of capital which has been resolved upon does not involve either the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital; but the allegation is that, before the passing of the special resolution, the capital of the company, paid up or deemed to have been paid up, had ceased to be represented by available assets to the extent of £113,118, and this is what is commonly termed "writing off lost capital." [Having stated the nominal capital of the company, the classes of shares, and the nature of the proposed reduction, his Lordship continued:—]

The first point is whether the allegation is made out as to the capital being either lost or not represented by available assets, and in my opinion the company have proved that allegation. The circumstances connected with this floating dock are somewhat remarkable. This company—the third—was incorporated in 1878 under a scheme of reconstruction of the second company. The capital that I have mentioned was fixed apparently for the

(1) [1894] A. C. 399.

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purpose of letting in those who were interested in the old company. It was argued for the Respondent, as a material circumstance in this case, that the £163,618 capital did not, in the incorporation of this company, or ever, represent the true value of the dock. There is much to be said in support of that contention. At the time when this company was incorporated the value of the structure at *St. Thomas Island* was certainly less than the £163,000; but there were at that time, as the evidence before me shews, great expectations of future profit, which unfortunately have not been realized. Sixteen years have elapsed since the dock, which had to be repaired, was opened for work, and, with one exception, namely, in the year 1882, the amount required for the payment of a dividend to the first preference shareholders has not been reached. The circumstances attending the trade of the dock are also detailed in the affidavits. [Having stated and criticised the evidence in support of the petition, his Lordship continued:—]

Now the reason of my going somewhat in detail into the evidence is the argument that has been addressed to me on behalf of the dissentient shareholder. The effect of the evidence is to displace one of the main contentions put forward on his behalf. It was said, if it was right to reduce at all, was it not right to reduce in the year 1878? It is plain that the undertaking was over-valued in that year, and the company would have been justified if it had come forward with a reduction scheme about that time, or at a time shortly afterwards. The answer is that reasonable expectations were entertained when this scheme for the formation of the third company was sanctioned by the Court, that the property—though valued as a structure it was not worth the £163,000—was looked upon as an income-earning structure worth somewhere about that sum. Probably it was not worth that sum, and there is something in the articles (to which I will refer in a few minutes) which points in that direction.

Then it is said that the directors by their report have admitted that they have not been properly maintaining the dock as a structure; and a passage from their report, which was issued in view of this reduction scheme, was referred to which, in my

opinion, cannot be taken as an admission on the part of the directors that they have not done their duty in keeping up the dock. I refer now to the 100th article, which deals with the net profits, but for the moment only to that part of it which shews how the net profits are to be applied: "After setting apart" (says the article) "such sums for repairs and renewals as the directors shall from time to time consider necessary or proper." The directors under that have a discretion as to the sum which shall be devoted to repairs or renewals. There is a duty, no doubt, of maintaining the work in a reasonable state of repair by means of timely repairs and timely renewals; but it is scarcely necessary for me to state that under such a clause as this the directors were not bound to construct a new dock. They were only bound to do the best they could for this iron and wooden structure with a view to keeping that structure in a fair state and condition. Like the case of repairing a house, the covenant to repair does not involve on the covenantor a liability to build a new house. Now the evidence shews that this dock, as might have been expected in the *West Indies*, is naturally deteriorating; and I can find, to sum up this matter, no ground for saying that the depreciation in the value of the company's property, and the corresponding reduction proposed to be made of the capital, is attributable to any negligence on the part of the directors in not doing their duty by upholding the structure and keeping it in a proper condition.

Now, I pass to the articles, and premise what I have to say by stating, that I have not the case before me of a proposed reduction of capital, at the expense of the ordinary shareholders and the second preference shareholders, where a preference is conferred as to dividend only. The preference in this case which the first preference shares have over the second, and the second have over the ordinary shares, is a preference of capital also. Now, the clause as to dividends, which I will deal with quite shortly, is that the net profits, after setting apart the sums for repairs and renewals which I have already mentioned, shall be divided in each year as follows: the first preference shares get a dividend at the rate of 6 per cent., contingent on the profits of the year, and the second a dividend of 5 per cent., also contingent

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upon the profits of the year; then comes a clause, which I have said I would refer to for the purpose of shewing that the parties in producing this scheme of reconstruction had reasonable doubts whether there would remain anything after the two first preferences had been satisfied their dividend: "The ultimate surplus (if any) of the net profits in each year shall be paid to the holders of ordinary shares." Then the 115th article is: "If the company should be wound up, the assets of the company, so far as the same will extend, shall be divided among the first preference shareholders, and if any surplus shall remain after payment to them" (here again is "if any surplus") "of the nominal amount of their shares, the same shall be divided among the second preference shareholders, and only the ultimate surplus (if any), after paying them the nominal amount of their shares, shall be divided among the ordinary shareholders." The resolutions for reduction were carried in accordance with the articles, and the meetings were well attended. There were 15,700 odd first preference shares, rather more than three-quarters; 15,764, more than three-quarters of the second; and a good many of the ordinary shareholders. That was at the first meeting, which, of course, is the important meeting. The evidence also shews that the special resolution was carried unanimously. The dissentient shareholder did not attend. He stands alone; but still, though he stands alone, the Court will not on that account, because he is in a minority of one, refuse to give him a proper hearing and consider all the points that are raised.

Now, the Act of Parliament has conferred this right of reducing capital on the company itself, and the Court will not refuse to confirm unless it sees that something unfair or unreasonable is being done. In this case I have the great advantage of the large majority of three-quarters of each class of preference shareholders present and voting unanimously that this was the right thing to do from a commercial point of view. I have the majority required by the statute, and the majority required by the articles in respect of each set of preference shares. Now the evidence which I have gone through shews that this is not a mere temporary depression in trade, but that

the current of trade has changed; and I ask myself this question, Is there any reasonable probability of a change for the better coming within any reasonable period of time? Taking a reasonable view, as I think, of the circumstances as detailed to me in evidence, and looking upon the prospect of this dock as an income-earning structure to make upwards of £4260 a year, I say it is in the highest degree improbable. I think the evidence justifies me in the conclusion that the second preference and ordinary shareholders have no interest whatever in the concern. Where there is a loss of capital, and there are classes of shareholders as here, the loss should be made to fall upon that class which, according to the constitution of the company, has to bear it; and it is for the reason of seeing whether it was an unfair thing to throw the loss upon the second preference and the ordinary shareholders that I have carefully considered the constitution of this company. The result is that, in my opinion, I ought to exercise my judicial discretion by confirming the reduction of the capital.

Solicitors: *Radcliffe, Cator & Hood; Field, Roscoe & Co.*, agents for *Smith, Pinsent & Co., Birmingham.*

W. C. D.

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March 9.

In re COOK'S MORTGAGE.

[1895 C. 027.]

Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 29 (*e*)—*Vesting Order—Deceased Mortgagee—Uncertainty as to Personal Representative—Disputed Will.*

A mortgagee of freehold land died, having made a will by which he appointed executors. The validity of the will was disputed by the testator's widow, and an action to establish the will had been commenced in the Probate Division, but had not yet been tried. The mortgage debt had been paid:—

Held, that it was, within the meaning of sect. 29 (*e*) of the *Trustee Act*, 1893, uncertain who was the personal representative of the deceased mortgagee, and that the Court had jurisdiction to make an order vesting the mortgaged land in the mortgagor.

PETITION by a mortgagor for a vesting order as to freehold land.

The mortgage was executed on the 18th of February, 1882, to *Thomson* and *Brooks*. The mortgage money was advanced by them out of moneys belonging to them on a joint account. *Thomson* died on the 25th of March, 1893. *Brooks* died on the 22nd of November, 1894.

The money due upon the mortgage was all paid by the mortgagor on the 10th of May, 1894, but a reconveyance had not been executed. *Brooks* had made a will, by which he appointed executors. The validity of the will was disputed by his widow and an action to establish it had been commenced in the Probate Division, but had not yet been set down for trial. The mortgagees had never entered into the possession or into the receipt of the rents and profits of the land. The petition asked that the mortgaged premises might vest in the Petitioner for the whole estate therein which would now be vested in *Brooks* (if living), but freed and discharged from all moneys secured by, and from all claims and demands under, the mortgage deed.

The petition had been served upon the persons who were nominated by the will of *Brooks* as his executors, but they did not appear.

J. Rolt, for the Petitioner, submitted that, under the circumstances, it was within the meaning of sub-sect. (*e*) of sect. 29 (1) of the *Trustee Act*, 1893, "uncertain" who was the personal representative of *Brooks*, and, therefore, the Court had power under that section to make a vesting order as asked.

NORTH J.:—

In my opinion, sub-sect. (*e*) applies to this case. Inasmuch as the word "devisee" occurs in the latter part of the sub-section, I think that part is not confined to the case of a mortgagee who has died intestate. I will therefore make a vesting order as asked by the petition, except that the words "freed and discharged, &c.," must be omitted. I should not make a vesting order at all unless I was satisfied that the mortgage money had been paid.

Solicitors: *Thomsons, Brooks & Danby.*

(1) By sect. 29: "Where a mortgagee of land has died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that last-mentioned person consents to any order for the reconveyance of the land, then the High Court may make an order vesting the land in such person or persons in such manner and for such estate as the Court may direct in any of the following cases, namely (*inter alia*):—

"(*e*) Where there is no heir or personal representative to a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his heir or personal representative or devisee."

W. L. C.

NORTH J. 1895 *Feb.* 8, 9; *March* 14.

In re ECCLESIASTICAL COMMISSIONERS AND NEW CITY OF LONDON BREWERY COMPANY'S CONTRACT.

[1894 E. 1288.]

Statute—Construction—Union of Benefices Act, 1860 (23 & 24 *Vict. c.* 142)—*Union of Benefices Amendment Act*, 1871 (34 & 35 *Vict c.* 90), *s.* 4—*Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict. c.* 34), *s.* 1—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *ss.* 2, 3, 5—*Open Spaces Act*, 1887 (50 & 51 *Vict. c.* 32), *ss.* 2, 4, *and Schedule*—"*Set apart for the purpose of Interment*"—*Site of Church.*

The power to build on the site of a metropolitan church sold under a scheme made in pursuance of the *Union of Benefices Act*, 1860, is not interfered with by the *Union of Benefices Amendment Act*, 1871.

The site of a church where intramural burial has taken place has not been "set apart for the purposes of interment," and therefore, when so sold, is not within the prohibition against building in the *Disused Burial Grounds Act*, 1884, as affected by the *Open Spaces Act*, 1887, and the *Metropolitan Open Spaces Act*, 1881.

Sect. 5 of the *Disused Burial Grounds Act*, 1884, applies to dispositions made after the Act.

UNDER the *Union of Benefices Act*, 1860, a scheme dated the 28th of April, 1892, for the union of the benefice of the united parish of *All Hallows-the-Great, Upper Thames Street*, and *All Hallows-the-Less*, and the benefice of the united parish of *St. Michael Royal* and *St. Martin Vintry*, was prepared by the Ecclesiastical Commissioners, in accordance with proposals laid before them by the Bishop of *London*, and assented to by the respective patrons and vestries as required by the Act.

The scheme provided that on the union of the benefices taking place the church of *All Hallows-the-Great* should be taken down, and the site, materials, and furniture (with certain exceptions) should be sold by the Commissioners.

The scheme was duly confirmed by Order in Council, dated the 16th of May, 1893, and on the 9th of June, 1893, the union took effect by the retirement of the incumbent of one benefice and the induction of the incumbent of the other benefice as first incumbent of the united benefice.

The consents required by sect. 17 of the Act to the sale of the church of *All Hallows-the-Great* were given on the 6th of July, 1894, and on the 10th of July, 1894, the certificate of the churchwardens of the united parish as to the removal of human remains from the site of the church was given.

The site and materials and some of the furniture of the church were put up for sale by public auction on the 31st of July, 1894.

Lot 1, which comprised the site and the materials, with certain exceptions, was purchased on behalf of the *New City of London Brewery Company, Limited*, at the price of £13,100. The particulars of sale described the site as "a freehold corner building site." One of the purchasers' requisitions was "the site of the church (which is sold for building purposes) appears to be a disused burying ground within the meaning of the *Disused Burial Grounds Act*, 1884, and the *Open Spaces Act*, 1887, s. 4, and as such prohibited to be built upon: see also *In re Ponsford and Newport District School Board* (1). The vendors must shew that the purchasers will be at liberty to erect new buildings for secular purposes on the site of the church." The vendors insisted that the site was not a disused burial ground. This summons was taken out by the purchasers for a declaration to the effect of the above requisition, and that the vendors were unable to shew a good title in accordance with the conditions of sale, for a return of deposit, and for costs.

S. Hall, Q.C., and *Heath*, for the purchasers:—

We admit that the site of a metropolitan church can under the *Union of Benefices Act*, 1860 (23 & 24 Vict. c. 142), where all the requisites of the Act are complied with, be sold for building. It is to be observed, that sect. 17 provides that nothing in the Act contained shall legalize the sale or letting of any churchyard or burial ground.

But sect. 4 of the *Union of Benefices Act*, 1871, provides for the fencing in of the site of any church wholly or partly pulled down: that provision is inconsistent with the sale of the site of a church, and therefore repeals the provisions of the Act of 1860, so far as they empower the sale of a church site for building; nor

(1) [1894] 1 Ch. 454.

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does the proviso at the end of the section, that the Act is not to apply to proceedings for the union of benefices under the Act of 1860, affect the question, for the union of a benefice does not require the sale of the site of a church.

In the next place, the joint effect of the *Open Spaces Act*, 1887 (50 & 51 Vict. c. 32), and the *Metropolitan Open Spaces Act*, 1881 (44 & 45 Vict. c. 34), is to incorporate into the *Disused Burial Grounds Act*, 1884 (47 & 48 Vict. c. 72), the following definitions: "a 'burial ground' includes any ground whether consecrated or not which has been at any time set apart for the purpose of interment," and "a 'disused burial ground' shall mean any burial ground which is no longer used for interments." That brings the site of the churchyard in question within the prohibition contained in the 3rd section of that Act against erecting buildings on the site.

In *Phillimore's* Ecclesiastical Law (1) it is said, "According to the general canon law, the usual place of burial is the church or churchyard of the parish in which the deceased person lived"; and again (2), quoting from Lord *Stowell*, "In our own country, the practice of burying in churches is said to be anterior to that of burying in what are now called churchyards, but was reserved for persons of pre-eminent sanctity of life." And the learned author adds, "But it is much discountenanced by the present policy of the Church, as injurious both to the stability of the fabric and the health of the parishioners."

[NORTH J. referred to *Ecclesiastical Commissioners for England* v. *Kino* (3).]

In *In re Ponsford and Newport District School Board* (4) it was held that a "disused burial ground" means any ground which has been at any time set apart for the purpose of interment, whether interments have taken place in it or not, and which has been partially or wholly closed by statute or Order in Council, or has become otherwise disused. *In re Trustees of St. Saviour's Rectory and Oyler* (5) shews that when sect. 5 of the Act of 1884 says that nothing in the Act contained "shall

(1) Vol. i. p. 839.
(2) Ibid. 841.
(3) 14 Ch. D. 213.
(4) [1894] 1 Ch. 454.
(5) 31 Ch. D. 412.

apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament," the words "has been" do not include "shall have been." The decision also shews that the Act of 1884 supersedes a prior Act which authorized a sale, even though that Act has not been in express terms repealed.

Swinfen Eady, Q.C. (*Blakesley*, with him), for the Ecclesiastical Commissioners :—

The Commissioners have power to sell this site for the purpose of its being built upon. The Act of 1860 contains elaborate provisions for the union of benefices in the dioceses of *London* and *Winchester*, and for the pulling down of churches which have become practically useless, so that other churches may be erected in other places where they are wanted, and where they will be of greater benefit to the people. The object of the Act was that the superfluity of one district should be applied in aid of the necessity of another. It was clearly contemplated that the site of a church should be sold, even though there had been interments in the church, for there are provisions for the removal of bodies and their re-interment elsewhere. The funds for carrying out the purposes of the Act were to be derived mainly from the sale of the sites of the churches which were pulled down, and if those sites could not be sold as building sites their value would be but small. The fact that building on churchyards or burial grounds is expressly prohibited goes to shew that the prohibition was not meant to extend to the sites of churches, and an essential part of a scheme under the Act of 1860 for the union of benefices is the sale at building land price of the site of a church which is pulled down.

[He was then stopped by the Court.]

NORTH J. (after stating the effect of the *Union of Benefices Act*, 1860 (23 & 24 Vict. c. 142), and particularly referring to sects. 14 and 16, continued) :—

Under that Act, as it stands, there can be no question that the site of the church which has been pulled down can be used for the purpose of being built upon, and, in point of fact, the

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scheme made in accordance with the Act provides that it is to be sold for building, and the Act of Parliament says that what is contained in the scheme duly approved is to have the force of law. Therefore, under this Act, there can be no doubt of the title of the Ecclesiastical Commissioners to sell it as building land to the purchaser, or of the right of the purchaser to build upon it.

But it is said that the effect of the Act has been interfered with by certain subsequent Acts of Parliament. The first is an Act of 1871 (34 & 35 Vict. c. 90). It refers to two Acts which are recited in the Act of 1860, but it does not recite the Act of 1860 itself. It is called "The *Union of Benefices Amendment Act*," and I do not see anything to confine it, like the Act of 1860, to the limits of the metropolis. [His Lordship referred to the 3rd section of the Act of 1871, which provides for the pulling down in some cases, wholly or in part, of one of the churches of a united benefice, and proceeded:—]

That seems to me to be something different from and less extensive than the provisions of the Act of 1860. It only deals with particular cases, and what is authorized to be done by this Act may be done by the Bishop by a faculty, and it is not necessary to consult the Archbishop, or the Secretary of State, or the Archdeacon. So it gives him a special power of doing something that could not be done before, in that way at any rate. Then the 4th section is the one that is said to apply here. It enacts, "The site of any church which shall be wholly or partly pulled down, and the churchyard belonging thereto, shall be properly fenced in and preserved and kept free from desecration, and until such churchyard shall be legally closed for interments the persons for the time being having rights of burial in such churchyard shall not be entitled to rights of burial in any other churchyard within the limits of the same united or separate benefice." This is followed by a proviso that I ignore for the moment. Now, it is said the phrase "the site of any church" applies to the site of this church with which we are now dealing. My first answer is that I do not so read the Act. I do not think the words mean "the site of any church" entirely independently of the rest of the Act. This is an Act which gives

a limited power to a Bishop to grant a faculty; and such an Act is not the place in which one would expect to find a provision affecting the whole general scheme of the Act of 1860 without any reference to it. I read the 4th section as though it ran thus: "in such case the site of any church"—the words "in such case" are not expressed, but I think they are implied from the way in which the 4th section follows on the 3rd; the 4th section is going on to deal with what is provided for by the 3rd section to a limited extent. It does not mean the site of any church which under any Act of Parliament shall be wholly or partly pulled down, but the site of the church which the previous section has contemplated shall be wholly or partly pulled down. What is to be done with such a site? It is necessary to make some provision with respect to it, and the words of the 4th section are clear. I do not think it would be right, reading those two sections together, to say the latter refers to anything more than the site of a church wholly or partly pulled down under the provisions of this Act. That is the first reason why I think this Act does not apply.

There is another reason to be found in the proviso at the end of the 4th section: "Provided always, that nothing in this Act contained shall apply to any proceedings for the union of benefices taken under the provisions of 23 & 24 Vict. c. 142." Now, the proceedings that have been taken in respect to the church with which we are now dealing have not been taken under the Act of 1871 at all, but under the Act of 1860; and when it is suggested that selling the site cannot be a proceeding under the Act of 1860, I cannot imagine why it is not; because it is one of the necessary things that have to be done under the Act of 1860 in providing for the scheme, the nature of which makes it essential to proceed to a sale of the church.

There is yet a third reason. I think the construction of that section is settled by the decision of the Court of Appeal in the case of *Ecclesiastical Commissioners for England* v. *Kino* (1). That is a case very much in point, because there one of the churches authorized by the Act of 1860 to be pulled down had been pulled down under a scheme, and, while that land was yet

(1) 14 Ch. D. 213.

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vacant, a neighbour was proceeding to erect houses on his own land, which, if the land of the plaintiffs was to remain vacant, he had a perfect right to do. The site of the church had to be sold; and the erection contemplated by the defendant would interfere with the access of light to any new buildings built on the site of the church, and it was decided that the Ecclesiastical Commissioners could prevent him from building, not because they were to leave this land vacant, as they would have had to do if sect. 4 of the Act I last read applied to the case, but because they were going to sell it for building. The whole decision proceeds on the footing that this land was to be rebuilt upon. This was in 1880—the Act I last read having been the Act of 1871. Without referring to the opinion of all the Lords Justices, who agreed in the same view, I think it is sufficient for this purpose to refer to what was said by Lord Justice *Cotton* (1): "But then it was said here that the plaintiffs themselves cannot rebuild, and that therefore what they have to do is to sell the site and the site only. I will deal with the latter part of the objection first. As I understand, they have vested in them under the Act of Parliament the building and fabric of the church and the ground on which it stood, and they have vested in them that building with every right which the church and the owner of the church enjoyed. No doubt they were required to pull down the church and sell the site, but in selling the site they could, in my opinion, convey to the purchaser all the rights they themselves would have had if they had been in the position of ordinary owners, having acquired the land with the intention or obligation to pull down the old building and put up a new one, in doing which, if they desired to continue the enjoyment of the old right of light, they could have put up the windows in the same position as formerly. Therefore, although they themselves cannot rebuild and are required to sell, they can, in my opinion, convey to the purchaser the same right which, if they had built, they would have had of putting up a building with windows in the old places, and entitled to the old easement." That seems to me conclusive upon the construction of the Act of Parliament in question. I do not notice in that

(1) 14 Ch. D. 226.

case that the Act of 1871 was actually referred to; but the Act of 1860 was fully commented upon, and I cannot believe that the Act of 1871 was entirely overlooked by all parties concerned in the case. In my opinion, therefore, that Act does not interfere with the powers of the Ecclesiastical Commissioners to sell this land for building purposes; or of the purchaser to build thereon.

Then we come to some other Acts. The first is the *Metropolitan Open Spaces Act* of 1877, by which the power of maintaining open spaces was conferred on the Metropolitan Board of Works.

Then we come to the Act of 1881 (44 & 45 Vict. c. 34), which is called "An Act to amend the *Metropolitan Open Spaces Act*" of 1877, which I have just referred to. Then it defines, for the purpose of the Act, what the owner of a churchyard, cemetery, or burial ground means; and then comes this: "The term 'burial ground' shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, and in which interments have taken place since the year 1800." [His Lordship referred to the repeated use of the phrase "churchyard, cemetery, or burial ground" in sects. 4, 5, and 9 of the Act under discussion, and proceeded:—]

Now, I have read those sections for the purpose of shewing how very carefully throughout the Act a distinction is drawn between the words—"churchyard, cemetery, or burial ground," and whatever the definition clause may say, I cannot believe that if it was intended the Act should apply to the site of a church it would have been simply by the use of the words "burial ground," when "churchyard" is expressly excepted from the operation of the Act of 1860, and when in this Act the phrase "burial ground" does not include a churchyard or cemetery. I do not say that that definition is not large enough to include them; but when you have the three things dealt with separately, I think it is fair to say that the Legislature, which did provide as to churchyards and as to cemeteries expressly, did not intend to deal with them again under the name of "burial grounds."

We come next to the Act of 1884 (47 & 48 Vict. c. 72), which

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is an Act for preventing the erection of buildings on disused burial grounds. It does not in terms refer to the Act of 1860 for the union of benefices at all. It is a very short Act. The 1st section deals with the title. The 2nd section, since repealed, provides: "A 'disused burial ground' shall mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein in pursuance of the provisions of the said recited Acts." In my opinion, that definition of a disused burial ground does not apply to the site of a church that has been pulled down under an Act of Parliament. Then sect. 3 enacts: "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship." That is the section which is relied upon here as being the principal impediment in the way of the purchaser of the site of this church building on this land. Before referring further to it, I will refer to the Act of 1887 (50 & 51 Vict. c. 32), which is not a disused burial ground Act, but an open spaces Act. The 2nd section in sub-sect. 1 repeals the last line of the definition of a burial ground which I have read from the Act of 1881. Then it proceeds in sect. 2, sub-s. 2: "The playing of any games or sports shall not be allowed in any churchyard, cemetery, or burial ground in or over which any estate, interest, or control is acquired under s. 5 of the *Metropolitan Open Spaces Act*, 1881." Again, there is the same phraseology—churchyards, cemeteries, and burial grounds are treated as separate and distinct things. And in sect. 3 there is a provision for the removal of tombstones in any disused churchyard, cemetery, or burial ground. Then, in sect. 4, it is enacted that in the Act of 1884 "burial ground" shall have the same meaning as in the Act of 1881 as amended by this Act; and that a "disused burial ground" is to mean any burial ground which is no longer used for interments, whether or not it has been partially or wholly closed under any statute or Order in Council. Then, again, there is another provision in the 11th section that the Metropolitan Board or the sanitary authority may exercise all the powers given to them by the *Metropolitan Open Spaces Act*, 1881, or this Act respecting open spaces, churchyards, cemeteries, and

burial grounds transferred to them in pursuance of the said Act, or of this Act in respect of any open spaces, churchyards, cemeteries, and burial grounds of a similar nature which are or shall be vested in them in pursuance of any other statute, or of which they are otherwise the owners. So that the same phraseology is preserved in these Acts throughout—churchyards, cemeteries, and burial grounds are spoken of as cognate but different things.

Now I turn back to the Act of 1884, and what it comes to is this—a burial ground is to include any ground, whether consecrated or not, which has been at any time set apart for the purpose of interment; and a disused burial ground is any burial ground, that is, any such burial ground, that is no longer used for interments. Then, let me add to that what was pointed out in the Court of Appeal in *In re Ponsford and Newport District School Board* (1), that whether a burial ground ever has been used for interments or not is entirely immaterial.

It is said that the building upon this site would be an express disobedience to the 3rd section of the Act of 1884. Now the first question is whether this land comes within that definition. Is it a piece of ground, whether consecrated or not, that has been at any time set apart for the purpose of interment? Can it be said that a piece of land devoted to the building of a church is set apart for the purpose of interment? In my opinion it cannot. It would be an abuse of words. It is not set apart for anything of the kind. It is set apart as a building for public worship, entirely irrespective of the question whether interments shall take place there or not. Interments have taken place sometimes in churches, and they have in this church; but, in my opinion, what is set apart for the building of a church cannot be said on any fair meaning of the words to be set apart for the purpose of interment. Then there is this to be borne in mind—that many pieces of land are set apart for building a church in which no interments ever take place, and, nowadays, unless under very special circumstances indeed, when a piece of land is set apart for a church, you cannot by law have any interments take place on that land. It would be absurd to say that land is not set

(1) [1894] 1 Ch. 454.

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apart for a church just as it ever was; although, no doubt, an incidental use to which such land was sometimes applied in former days cannot be applied to land now so set apart.

I pass now to another consideration. Can it be said that by this phrase the express provisions of the Act of 1860 are repealed by implication? Expressly repealed they are not. That is quite clear. There is no reference to the provisions of that Act, and it is difficult to believe it could be intended by this Act to defeat entirely the object of the Act of 1860 so far as relates to the union of benefices under that Act, where the whole scheme, a very expensive scheme, is to be carried out by machinery involving a reference to a great many persons and a considerable time and great expenditure, and ultimately culminating in an Order of Council. It is said that this is all done away with by implication, because this Act says that no building can be erected on the site of a church, and, therefore, the whole object and machinery of the Act is impliedly defeated and rendered null. I do not think that is the meaning of this Act. I do not think it is intended to apply to any such state of things as this. What is more, I think, when one looks at sect. 5, there is quite enough to shew that this was not intended to be the operation of it. Sect. 3 provides that, "after the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground," with certain exceptions which are not now material. Then sect. 5 is this: "Nothing in this Act contained shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament." Just see how the matter stands as regards this particular site. When the conveyance has been completed and the purchase-money paid, the land will have become vested in a purchaser who will proceed to build upon it. What is there to prevent him? Any person who says he cannot do so must, according to the argument before me, rely upon the 3rd section of this Act, saying this is the site of a disused burial ground, and no building is to be erected upon it. But sect. 5 says that nothing in the Act shall apply to a burial ground which, like this, has been sold or disposed of under the authority of any Act of Parliament. It must then be contended that this means sold or disposed of before

the passing of this Act. For that I see no foundation whatever. Where in the 3rd section something is intended to depend on the passing of the Act those words are used—"After the passing of this Act it shall not be lawful" to do so and so. Then I look at sect. 4. It is a very important one, as throwing light on the meaning of this Act: "Nothing in this Act shall prevent the erection of any building on a disused burial ground for which a faculty has been obtained before the passing of this Act." Therefore, in that case, if a burial ground has been disused and a faculty has been obtained for erecting a building upon it, that may be done notwithstanding the passing of the Act. It does not say that it cannot be done although a faculty has been obtained. It says that where a faculty has been obtained before the Act was passed it may be done notwithstanding the Act; and although the obtaining of a faculty, the lesser thing, before the passing of the Act is not to prevent building on the site, yet it is said the greater thing, obtaining an Act of Parliament before the passing of the Act, is to be nullified by this section, which says: "Nothing in this Act contained shall apply to any burial ground which has been sold or disposed of"—before the passing of the Act, it is suggested—"under the authority of any Act of Parliament." Why is it to be confined in that way? Why, if a building can be erected upon land with respect to which a faculty has been given, should it not equally be erected on land in respect of which an Act of Parliament has been passed? I cannot imagine any reason for giving less power where the land has been dealt with under an Act of Parliament than where it has been dealt with under a faculty. On the contrary, inasmuch as an Act of Parliament can be overriden by another Act of Parliament, there is not the least reason why any attempt should be made to limit the power of Parliament in future by reading this section as meaning sold or disposed of before the passing of this Act under the authority of an Act of Parliament. It seems to me, therefore, that there is no ground whatever for limiting this section to a case in which the sale or disposition under an Act of Parliament has taken place before the passing of this Act; and to do so would be introducing something into the section which is not found there, but which is expressed in the 3rd and 4th sections,

NORTH J. 1895 *In re* ECCLESIASTICAL COMMISSIONERS AND NEW CITY OF LONDON BREWERY COMPANY'S CONTRACT.

where it is intended to impose such qualification. The result is that the 3rd section of the Act of 1884 does not apply to this case.

Then it was said that the contrary had been decided by Vice-Chancellor *Bacon* in the case of *In re Trustees of St. Saviour's Rectory and Oyler* (1). If I found a clear decision of another Judge upon the point, I should follow it; but in my opinion, although there is a good deal of similarity between the two cases, and I do not wonder at that case being cited as bearing on the present, yet it does not. The question there was this. The *St. Saviour's Southwark Act* of 1883 recited that certain land was then vested in trustees in trust to apply the income for the purposes therein mentioned, and it was then by sects. 6 and 7 vested in the trustees on trust to pay the income for purposes corresponding to the original trust; and by sect. 9 the trustees were empowered to sell the land or let it on building or other leases. The land had been formerly used as a burial ground until 1853, when it was closed by an Order in Council, and thus had become a disused burial ground. Sect. 3 of the Act of 1884 was of course relied upon. Then in 1885, after the Act passed, the trustees put the land up for sale by auction, describing it in the particulars as "building land," "and stating in the conditions that, although it was a disused burial ground, they believed it came within sect. 5 of the Act of 1884, and that they had therefore power under the Act of 1883 to sell it as building ground." The head-note states: "*Held*, on a summons by the trustees under the *Vendor and Purchaser Act*, 1874, that the Act of 1883 did not constitute a sale or disposition 'under the authority of any Act of Parliament,' and that, having regard to the Act of 1884, the contract could not be enforced against the purchasers." Now, that was a decision that the Act of 1884 interfered with the Act of 1883. It was in *pari materia* no doubt with, but not the same, as the Acts I have to deal with. In the next place, I entirely agree in the decision that the Act of 1883 was not a sale or disposition under the authority of an Act of Parliament. It seems absurd to say that an Act of Parliament creating a power of sale is in itself an exercise of the power which the Act

(1) 31 Ch. D. 412.

creates; and the Vice-Chancellor's decision to that effect seems to me the only possible one.

There, no doubt, the question which is raised here might have been raised, namely, whether the 5th section was confined to sales before the passing of the Act; or whether when the sale was completed the land could be built upon; but this certainly was not the ground on which the learned Judge decided the case. As far as the report goes, neither counsel nor the Judge addressed themselves to the question whether sect. 5 of the Act of 1884 was confined to a sale before the Act or not. In my opinion, although that result may be said to follow from the decision, yet when I find it is not raised in the argument or referred to by the learned Judge in his decision, it is no reason why I should hesitate to come to the clear opinion that I do, namely, that sect. 5 is not confined to a sale or disposition made before the passing of the Act. If it is not, then when the present sale has been completed and the purchase-money paid, the purchasers will have a clear right to build upon the land. Under those circumstances the purchasers are wrong, and the summons must be dismissed.

Solicitors for the Ecclesiastical Commissioners: *White, Borrett & Co.*

Solicitors for the *New City of London Brewery Co.*: *Western & Sons.*

D. P.

STIRLING J.

In re TOWNSEND'S CONTRACT.

1895
Jan. 30;
Feb. 19.

Vendor and Purchaser—Copyholds—Devise of Freeholds and Copyholds to Trustees and their Heirs—Trusts to Pay Rents to A. for Life, and after her Death for such Persons as she should appoint—Estate commensurate with purposes of Trust—Estate of Inheritance—Copyhold Title.

A. B. devised to trustees, their heirs and assigns, all his freehold and copyhold estates, upon trust to pay the rents thereof to *C. D.* for life for her separate use; and after her death he directed them to stand seised of such estates in trust for such persons and purposes as she should by will appoint; and, in default of appointment, he devised the estates to her in fee.

After *A. B.*'s death, the trustees were admitted tenants of the copyholds; and they all died during the lifetime of *C. D.*

By her will *C. D.* appointed certain persons her trustees, and directed them to sell the copyholds and assure them to the purchaser, his heirs and assigns. After *C. D.*'s death, her trustees sold the copyholds by auction, and declined to shew the purchaser the devolution of the copyhold title from *A. B.*'s surviving trustee, on the ground that under *A. B.*'s will his trustees only took an estate for the life of *C. D.*, and that there was an executory devise to her in default of appointment, which had taken effect:—

Held, (1.) that under *A. B.*'s will his trustees took an estate of inheritance in *quasi* fee simple; (2.) that *C. D.*'s will operated as an exercise by her of her power of appointment; and (3.) that the legal estate in the copyholds remained vested in the surviving trustee of *A. B.*'s will, and the title thereto must be deduced accordingly.

ORIGINATING SUMMONS.

John Ward, by his will dated the 8th of January, 1853, devised to his three sons, "*W. L. Ward*, *G. G. Ward*, and *F. Ward*, their heirs and assigns, all and every my freehold and copyhold estates, with the fixtures and appurtenances to the same belonging, situate in the parish of *Hatfield Peverel* in the county of *Essex*, to hold the same to them the said *W. L. Ward*, *G. G. Ward*, and *F. Ward*, their heirs and assigns, for ever upon trust" to pay the rents and profits thereof to his daughter *Elizabeth Mary*, the wife of the Rev. *C. G. G. Townsend*, during her life, free from the control or debts of her then present or any future husband, and so that she should have no power to anticipate the same. And from and after the decease of the said *Elizabeth Mary Townsend* the testator directed the said *W. L.*

Ward, G. G. Ward, and *F. Ward* "to stand seised or possessed of the said estates, with their respective rights members and appurtenances In trust for such person or persons, for such estate or estates, use or uses, ends intents and purposes, and subject to by with and under such powers, provisions, conditions, and stipulations—as the said *Elizabeth Mary Townsend,* notwithstanding coverture, by will . . . shall from time to time direct limit or appoint; and in default thereof, and subject to any such direction or appointment, and so far as the same if incomplete shall not extend," the testator gave and devised the same "unto and to the use of the said *Elizabeth Mary Townsend,* her heirs and assigns, for ever."

The testator died on the 14th of October, 1861; and on the 9th of May, 1862, the trustees of his will were admitted on the rolls of the manor as tenants of the copyholds.

Elizabeth Mary Townsend, by her will dated the 26th of April, 1870, appointed *W. J. H. Townsend* and *C. B. O. Gepp* executors thereof and trustees for the purposes thereinafter mentioned, and (*inter alia*) directed them to sell as soon as conveniently should be after her decease all her copyhold land, cottages, and gardens, with the appurtenances copyhold of the manor of *Hatfield Bury,* and to assure the same to the purchaser thereof, his, her, or their heirs or assigns.

Elizabeth Mary Townsend died on the 21st of March, 1893. Her will was proved on the 8th of August, 1893, and her trustees put up the copyholds in question, together with freehold property adjoining, for sale by auction under conditions of sale which stated, so far as material, as follows:—

"The title to Lots 1 and 3" (which comprised the copyholds) "shall commence with the will of *John Ward,* of *Hatfield Peverel,* Esq., dated January 8, 1853, whose seisin in fee shall be assumed. By the before-mentioned will the property was devised by the said *John Ward* to his sons *G. G. Ward, W. L. Ward,* and *F. Ward,* upon trust for his daughter *Elizabeth Mary Townsend* for life, with remainder to such uses as she should by will appoint . . . All the trustees are dead."

The particulars stated that the sale was "by order of the trustees under the will of the late Mrs. *E. M. Townsend.*"

STIRLING J. 1895 *In re* TOWNSEND'S CONTRACT.

At the sale, which took place on the 25th of May, 1894, *Reuben Wash* became the purchaser of the copyholds; and the vendors afterwards delivered to him an abstract of title which did not shew when the trustees of *John Ward's* will died, or how the copyholds had devolved.

The purchaser then delivered (amongst others) the following requisitions:—

"It is stated in the conditions of sale that all the trustees of *John Ward's* will are dead. As they were admitted tenants on the rolls, the devolution of the legal estate must be shewn, and the person entitled to be admitted must be admitted at the expense of the vendors, so as to be able to make a proper surrender to the purchaser. The purchaser requires to be furnished with the dates of the deaths of the several trustees."

To this the vendors replied: "The legal estate in the copyholds was vested in the trustees (in effect) for the life of Mrs. *E. M. Townsend.* Subsequently to her death, it vested in the appointees under her will. See *Scriven* on Copyholds, 6th Ed. p. 143."

The purchaser was not satisfied with this answer, and insisted on his requisition, whereupon the vendors took out an originating summons under the *Vendor and Purchaser Act*, 1874, asking for a declaration that the purchaser's requisitions and objections in respect of the title to the property had been sufficiently answered by them, and that a good title had been shewn in accordance with the contract.

Methold, for the vendors:—

Under the will of *John Ward* the trustees of the copyholds did not take an estate in fee simple or an absolute interest therein. They only took an estate commensurate with the purposes of the trust; *i.e.* such an estate as was necessary to enable them to carry out the intentions of the testator, and nothing more. They were to pay the rents and profits to Mrs. *Townsend* for life, and after her death to hold the property as she should appoint, and in default the testator devised it to her in fee. She has not appointed it, but has dealt with it as her

own property. The estate given to the trustees is exhausted and has determined; and under *John Ward's* will there is an executory devise to Mrs. *Townsend* in default of appointment. So that out of her own estate Mrs. *Townsend* has directed her own trustees to sell, and the vendors are entitled to put the purchaser in to be admitted: *Doe* v. *Barthrop* (1); *Baker* v. *White* (2).

Beddall, for the purchaser:—

The *Statute of Uses* has no application to copyholds. The distinction between the present case and *Doe* v. *Barthrop* is that there the gift to the trustees and their heirs was not required for any purpose after the death of the lady who was to receive the rents during her life. She could by will appoint absolutely, or her heirs would take, and there was no necessity for the continuance of the trust after her death. And *Baker* v. *White* can be distinguished in a similar way. But here the limitations to the trustees are expressly carried on after the death of Mrs. *Townsend*; for the testator directs them after her death to stand seised or possessed of the estates in trust for such persons, and for such estates and purposes as she should by will appoint. This they could not do unless they had an absolute interest in the copyholds analogous to an estate of inheritance in fee simple. The entire legal estate being thus in the trustees, upon the death of the survivor of them it will devolve upon his heir, and, under the circumstances, the lord of the manor will be entitled to two fines—one upon the admission of the heir, and another on the surrender to the purchaser: *Morse* v. *Faulkner* (3). The vendors must accordingly at their own expense deduce the title to the legal estate, and procure the admission of the person entitled to be admitted, who must make a proper surrender to the purchaser.

Methold, in reply:—

The vendors can make a title under the will of Mrs. *Townsend*, and sell without an intermediate admission, and could require

(1) 5 Taunt. 382. (2) Law Rep. 20 Eq. 166.
(3) 1 Anstr. 11, 13.

STIRLING J. the lord to admit the purchaser on payment of one fine: *Holder* v. *Preston* (1).

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In re TOWNSEND'S CONTRACT.

Cur. adv. vult.

1895. Feb. 19. STIRLING J. (after stating the facts, continued):—

The question upon this summons is, whether the trustees of the will of *John Ward* took the legal estate in these copyholds. It is to be observed that the devise includes both freehold and copyhold estates; but it has been decided by the late Master of the Rolls in *Baker* v. *White* (2), that although the same general rules govern the determination of the question of what estate the trustees of the will can take in the case of both classes of property yet, in applying those rules, the question as to the freeholds and the copyholds must be decided irrespectively of the circumstance that both are comprised in the same devise. He says (3): "Now I come to treat of the gift of copyholds. The gift of copyholds standing alone seems to me to be quite as free from difficulty as the gift of freeholds standing alone. I pass from the consideration of their going together. I say that it ought not, in my opinion, to affect the construction. The gift of copyholds to *A.* upon trust for *B.* gives a legal estate in the copyholds to *A.*, and the reason of it is this, that you have no aid from the analogy of the *Statute of Uses*; the testator cannot intend to tell you it is to be settled according to the *Statute of Uses*, because the *Statute of Uses* never did apply to copyholds. So that you lose the reason for construing this will with reference to the *Statute of Uses*."

In the present case, reading the will shortly, freeholds and copyholds are given to the trustees, their heirs and assigns, upon trust to pay the rents and profits to Mrs. *Townsend* during her life for her separate use. There is no question that they took the legal estate during her life. Among the rules which are to be applied to gifts both of freehold and copyhold property to trustees is this, that where you find words of devise to trustees and their heirs, then those words are to have their full natural

(1) 2 Wils. 400. (2) Law Rep. 20 Eq. 166.
(3) Law Rep. 20 Eq. 175.

effect, as giving an estate of inheritance to the trustees, unless something is found on the face of the will which cuts that estate down in some determinate event. There are three cases which shew that: *Doe* v. *Davies* (1), *Poad* v. *Watson* (2), and *Collier* v. *Walters* (3). I need not go through them all, because the two former are sufficiently dealt with for my purpose by Sir *G. Jessel* in the last of the three. He says (4): "Now, the first observation to be made upon the will is this, that there is a gift to trustees and their heirs, and that the trustees and their heirs are to stand seised (they get legal seisin of something, and it was not denied that they must get an estate of freehold of some kind or other) 'for and during the term of the natural life of my brother *William*, and also until the whole of my just debts and all interest due thereon has been paid.' Now, the rule is this, that trustees under a devise to them and their heirs *primâ facie* take a fee. I would rather put the rule in the language in which it has been put in two cases. It is very important that these rules should be observed, for they are rules of real property law, and are not to be set aside at the mere caprice of a Judge, but they must govern him in interpreting these wills, and it is necessary to see what the rules are. They have properly been called subordinate rules, because the primary rule is to ascertain the meaning of the expressions in the will from the will itself; but in so ascertaining it, these subordinate rules become of importance. In the case of *Doe* v. *Davies* Mr. Justice *Patteson* lays down the rule in this way: 'If the devise be for purposes which are to last only for a certain time, the use of the word 'heirs' will not give a fee, the devise will be cut down to the time necessary for the purposes'—that is a certain time—'But if a fee be given in terms with trusts which by their nature extend over an indefinite time, it is not so'—here we have trusts for the payment of debts, which of course by their nature extend over an indefinite time—'if no particular time can be fixed at which the trusts shall end, the estate cannot be cut down.' That is the rule. Then Mr. Justice *Williams* gives the rule almost in the same terms. He says, 'The estate being given to the

(1) 1 Q. B. 430.
(2) 6 E. & B. 606.
(3) Law Rep. 17 Eq. 252.
(4) Ibid. 261.

STIRLING J. trustees for particular purposes, it cannot be deemed immaterial what terms are used in giving it. If the words are such as pass a fee, it lies upon those who contend for a less estate to cut down their import. It is true, according to the cases which have been cited, that the word 'heirs' is not decisive, if the purpose of the devise clearly cuts down the estate.' Now, this kind of case was again considered in *Poad* v. *Watson* (1); and there Mr. Justice *Coleridge* puts the rule in this way: 'The paramount rule is, to look to the intention as appearing on the whole will. But there are secondary rules, one of which is that the words of devise to trustees and their heirs are to have their natural effect to give a fee simple, unless something shews that it is cut down to an estate terminating at some time ascertained at the time of the testator's death. If no precise period for the termination can be shewn, it remains an estate in fee.' Then Mr. Justice *Erle* says: 'There are words clearly meaning that the testator gave the trustees a fee simple; but, if a less estate would certainly enable the trustees to fulfil all the trusts, the fee simple would be cut down to that estate. I examine this will, and I find several trusts which may go beyond the life of *Elizabeth*, and consequently no certain estate less than a fee simple will do.'"

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Applying that rule to the present case, I ask, What estate less than an estate of inheritance can satisfy the words of the will? The testator directs that from and after the decease of Mrs. *Townsend* the trustees are to stand seised or possessed of the said estates in trust (in effect) for such persons and purposes as she shall by will direct, limit, or appoint. Those words imply, to my mind, that the trustees were to take an estate lasting beyond the life of Mrs. *Townsend*. At what definite point, then, can the estate be cut down? The only suggestion which was made is that it is to be found in the words of the gift to Mrs. *Townsend*, her heirs and assigns, in default of appointment. It is said that there is to be found there something in the nature of an executory devise of the copyholds in default of appointment. Assuming that to be so, as it seems to me, Mrs. *Townsend* has by her will made a direction, limitation, or appointment of

(1) 6 E. & B. 606.

this property, for she has directed her executors to sell all her copyhold estates, and to assure them to the purchaser thereof. It is contended on the authority of the decisions in *Holder* v. *Preston* (1) and *Glass* v. *Richardson* (2) that this operates as a direction to appoint to the purchaser and that the direction ought to be read as taking effect with reference to the legal estate said to be devised to Mrs. *Townsend*. Looking at the will as a whole, I should, if it were necessary to decide it, be inclined to hold that the estate devised to Mrs. *Townsend*, her heirs and assigns, was equitable and not legal. But, assuming that the contention of the vendors as to the estate so divided is correct, I think that Mrs. *Townsend* has really given a direction, or made a limitation or appointment, by her will, within the meaning of the will of *John Ward*; and consequently, in the events which have happened, the legal estate remains vested in the trustees of his will. I have only to add that in so deciding I do not think that I am in any way departing from the decision in *Doe* v. *Barthrop* (3). The words in the will in that case were different. There was a devise of copyholds to trustees and their heirs in trust, to permit a Mrs. *Shipwash* to receive the rents, or to pay the same to her during her life, for her separate use; and subject to such estate and interest, the testatrix devised the property to such persons as Mrs. *Shipwash* should by will appoint, and in default of appointment to the right heirs of Mrs. *Shipwash*. It is to be observed that there nothing was said as to the trustees standing possessed of any estate after the death of Mrs. *Shipwash*, but the will starts afresh after the gift of the life interest, and makes a new devise to such persons as she should appoint, and then, in default, to her right heirs. That is in a different form from the devise in the will in the present case. I hold that in this respect the vendors have not sufficiently complied with the requisitions, and I will make a declaration to that effect.

Solicitors: *Gepp & Sons; W. Rogers.*

(1) 2 Wils. 400. (2) 2 D. M. & G. 658.
(3) 5 Taunt. 382.

W. W. K.

STIRLING J.
1895
March 14.

In re PYLE.
PYLE *v.* PYLE.

[1894 P. 2765.]

Conversion—Specific Devise of Real Estate—Lease by Testator with Option of Purchase—Codicil confirming Will—Exercise of Option after Death of Testator—Destination of Purchase-money.

Testator by his will, dated in 1886, specifically devised certain freeholds, and bequeathed his residuary real and personal estate to other persons.

On the 10th of June, 1890, he made a codicil, which did not in terms refer to the specifically devised property, but expressly confirmed his will. On the same day (but whether before or after the execution of the codicil was not known) he granted a lease of the specifically devised property, with an option of purchase to the lessee. After the testator's death the lessee exercised his option by purchasing the property. Upon a summons raising the question whether the purchase-money belonged to the specific devisee or fell into residue:—

Held, that, whether the codicil was executed before or after the lease, the testator must have known of the existence of the latter, and by confirming his will had indicated a sufficient intention to pass whatever estate he had in the property to his devisee, so as to take the case out of the general rule established by *Lawes* v. *Bennett* (1).

The principle recognised by *Wood* V.C. in *Weeding* v. *Weeding* (2) applied.

Emuss v. *Smith* (3) followed.

Adjourned Summons.

George Pyle, by his will dated the 20th of March, 1886, specifically devised certain freehold land at *Headley*, in *Hampshire*, to *John Pyle* for his life, with remainder to his sons, *C. F. Pyle* and *J. A. Pyle*, and gave his residuary real and personal estate upon trust for sale and conversion, and after payment of his debts and testamentary expenses upon trust for certain of his nephews and nieces.

On the 10th of June, 1890, the testator made a codicil to his will, by which he gave certain pecuniary legacies, and expressly confirmed his will.

On the same day he granted a lease of the land at *Headley* for

(1) 1 Cox, 167. (2) 1 J. & H. 424.
(3) 2 De G. & Sm. 722.

the term of five years, from the 24th of June, 1890, giving the lessee an option to purchase the reversion in fee upon certain terms.

The testator died on the 30th of September, 1890.

In 1893 the lessee exercised his option of purchase, and the property was conveyed to him in fee by a deed dated the 27th of September, 1893.

There was no evidence to shew whether the lease was executed before the codicil, or the codicil before the lease.

One of the executors and trustees of the will took out this summons, for the determination of the question whether, in the events which had happened, the proceeds of sale of the land at *Headley* belonged to the Defendants, *John Pyle*, *C. F. Pyle*, and *J. A. Pyle*, as specific devisees of that land, or fell into the residue of the testator's estate.

Stewart-Smith, for the executor, and for one of the residuary legatees.

Ashton Cross, for the specific devisees:—

It cannot be inferred that the lease was executed after the codicil. The Court will not presume against either instrument, but will as far as possible give effect to both: *Taylor* v. *Horde* (1). This case is governed by the principle formulated by Vice-Chancellor *Wood* in *Weeding* v. *Weeding* (2). The testator must have known of the existence of the contract, even supposing that he executed the codicil first. There is sufficient indication of his intention to pass to the devisees of the property his entire interest therein, whatever it might be. The case is not, therefore, governed by *Lawes* v. *Bennett* (3) and *Townley* v. *Bedwell* (4).

R. M. Pattisson, for the residuary legatees:—

There is nothing to shew which instrument was executed first, and it cannot be presumed that the execution of the codicil followed that of the lease. The exercise of the option of purchase operated to convert the property into personalty for all purposes:

(1) 2 Sm. L. C. 9th Ed. pp. 632, 699.
(2) 1 J. & H. 431.
(3 1 Cox, 167.
(4) 14 Ves. 591.

STIRLING J. 1895 *In re* PYLE. PYLE *v.* PYLE.

Lawes v. *Bennett* (1); *Collingwood* v. *Row* (2). The principle is independent of the question whether the will is executed before or after the instrument creating the option. *Lawes* v. *Bennett* has been recently referred to in *In re Adams and the Kensington Vestry* (3). *Drant* v. *Vause* (4) and *Emuss* v. *Smith* (5), referred to in *Weeding* v. *Weeding* (6), were decided on the ground that the testator had shewn an intention that the proceeds of sale should go in the same way as the property itself. In *Drant* v. *Vause* the execution of the will was three years later than that of the instrument creating the option, and the will specifically referred to the property though not to the lease itself. Here the codicil contains no reference to the property.

[STIRLING J.:—The codicil confirms the will. Is not that republication?]

Not for the purpose of ascertaining the testator's intention: *Powys* v. *Mansfield* (7). *Emuss* v. *Smith* has been recently considered in *In re Isaacs* (8). Although no doubt there was republication of the will by the codicil, that is not enough to take the case out of the general rule laid down in *Lawes* v. *Bennett*.

Stewart-Smith, in reply:—

This case is not within the principle referred to by Vice-Chancellor *Wood* in *Weeding* v. *Weeding*. There is here no specific reference to the property except so far as the mere republication of the will by the codicil can be taken as a reference to it. Republication of a will by a codicil is not republication for all purposes. It does not, for instance, operate to revive an adeemed legacy: *Booker* v. *Allen* (9); *Cowper* v. *Mantell* (No. 1) (10).

STIRLING J. (after stating the facts, continued):—

The general principle is well settled by the case of *Lawes* v. *Bennett*, which has recently been recognised and acted upon by Mr. Justice *Chitty* in *In re Isaacs*.

(1) 1 Cox, 167.
(2) 26 L. J. (Ch.) 649.
(3) 27 Ch. D. 394, 399.
(4) 1 Y. & C. Ch. 580.
(5) 2 De G. & Sm. 722.
(6) 1 J. & H. 424.
(7) 3 My. & Cr. 359.
(8) [1894] 3 Ch. 506.
(9) 2 Russ. & My. 270.
(10) 22 Beav. 223.

The decision in *Lawes* v. *Bennett* (1) was to the effect that where there is a contract giving an option of purchase of real estate, and the option is not exercised until after the death of the person creating the option, then the proceeds of sale go as personalty of that person, and not as part of his real estate. But that being the general rule, the testator may on the face of the will indicate an intention to exclude the operation of the rule. For instance, if the testator were to say that the property, whether remaining in specie, or converted under the option reserved to the lessee, should nevertheless go in the same way, the Court would plainly be bound to give effect to the intention so expressed. It is not necessary, however, that the testator should use the exact language which I have just used, for in a series of cases it has been held that where the testator sufficiently indicates his intention the Court will give effect to it. That was recognised in the case of *Weeding* v. *Weeding* (2), which was relied on by Mr. *Ashton Cross*, and Vice-Chancellor *Wood* there states the principle thus (3): "When you find, that, in a will made after a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract, without referring in any way to the contract he has entered into, there it is considered that there is sufficient indication of an intention to pass that property to give to the devisee all the interest, whatever it may be, that the testator had in it."

The case which comes nearest to the present, and seems to me to be extremely close to it, is that of *Emuss* v. *Smith* (4). There the testator made his will, dated the 22nd of October, 1830, by which he specifically devised a farm called *Nash's Own Farm*, and he gave his residuary real and personal estate to trustees upon certain trusts. On the 8th of May, 1837, he made a codicil which is immaterial. Then in 1838 he entered into a contract by which he granted in favour of a certain person the option to purchase the farm in question, and that was extended also to another property called *Williams' Farm*, which he had purchased or was then about to purchase by auction. In 1839 he made a

(1) 1 Cox, 167.
(2) 1 J. & H. 424.
(3) 1 J. & H. 431.
(4) 2 De G. & Sm. 722.

STIRLING J. second codicil, whereby, after reciting that since the execution of his will and first codicil he had purchased the estate, he devised the same to certain uses. But he did not refer in any way to *Nash's Own Farm*, and did not otherwise refer to his will. The option to purchase was, after the testator's death, exercised in respect of both the properties.

1895

In re PYLE. PYLE *v.* PYLE.

Vice-Chancellor *Knight Bruce*, in dealing with the case, said (1): "How this case would have stood if the codicil of 1839 had not amounted to a republication of the will, it is not necessary that I should say; for I am of opinion, that the codicil of 1839 did effect a republication of the will. Again, how this case would have stood if the contract of 1838 had been an absolute or ordinary contract of sale, binding one party to sell and the other to buy, and not, as it was, a contract resting merely in the option of the person with whom the testator entered into the contract, it remaining uncertain, during the whole of the testator's life, whether the purchase would ever take place or not, I also need not say. As the case stands, taking together the particular language of the will, and the particular language and the nature of the contract, upon which no option was expressed during the life of the testator, coupled with the fact of the republication by the codicil, I am of opinion, that it is consistent with the true construction of the testator's testamentary instruments, and the effect that ought to be given to republication,—that it is consistent with law, and justice, and reason, and consistent also with the cases of *Lawes* v. *Bennett* (2) and *Knollys* v. *Shepherd* (3), to say, that the purchase-monies of *Williams's Farm* and *Nash's Own Farm* belong to those who would have enjoyed them if Mr. *Galton* had not exercised the option of buying."

That was founded on three things—the specific devise in the will, the optional nature of the contract, and the republication of the will by the codicil. Now, it seems to me that these elements exist in the present case, and one of them is even more forcible than in *Emuss* v. *Smith* (4); for, as I have said, in this case the testator expressly confirms his will by the codicil.

(1) 2 De G. & Sm. 735.
(2) 1 Cox, 167.
(3) Cited in *Wall* v. *Bright* (1 Jac. & W. 494, 499).
(4) 2 De G. & Sm. 722.

There is one point of difference, namely, that in this case the lease and codicil were executed on the same day. There is a measure of uncertainty as to whether the lease preceded the codicil, or the codicil the lease, but it seems to me that the inference is, that if the lease conferring the option to purchase had not been actually executed when the testator made his codicil, it must have been on the eve of execution, and must have been present to the mind of the testator when he confirmed his will. Under these circumstances, I think there is a sufficient indication of intention to take the case out of the rule established by *Lawes* v. *Bennett* (1), and I so hold.

Solicitors: *C. G. Algar; H. E. Barren; Sismey & Sismey*, agents for *Arnold, Essell & Baker, Rochester.*

(1) 1 Cox, 167.

G. A. S.

KEKEWICH J.

1895

March 1.

GROOM *v.* CHEESEWRIGHT.

[1893 G. 18.]

Solicitor and Client—Costs—"Property recovered"—Charging Order—Security—Mortgage—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

A solicitor who has already accepted from his client a mortgage or other security for his costs in a pending action to which the client is a party cannot obtain a charging order for his costs under s. 28 of the *Solicitors Act*, 1860, upon the property "recovered or preserved" in the action.

MR. *EDMUND KIMBER* had acted as solicitor for the Plaintiff in this action, the object of which was to recover from the Defendants, *Cheesewright* and *Paterson*, shares and moneys alleged to be due from them to him, the Plaintiff, in connection with the promotion of the *Fifeshire Main Collieries, Limited.*

During the progress of the action, a mortgage was, at the request and by the advice of Mr. *Kimber*, executed by the Plaintiff for the purpose of securing Mr. *Kimber's* costs in the action and the debts of certain creditors of the Plaintiff.

This mortgage, which was prepared by Mr. *Kimber*, was dated the 25th of May, 1893, and made between the Plaintiff of the one part, and *Edward Maccall* of the other part. After reciting that the Plaintiff was entitled to have transferred to him by certain persons 100 fully paid-up preference shares of £5 each in the *Fifeshire Main Collieries, Limited*; that the Plaintiff was indebted to the said *E. Kimber* for certain costs, charges, and expenses in connection with the suit in Chancery then pending against *Cheesewright* and *Paterson* (referring to the above action) and otherwise, and was desirous of securing the same, and also any future costs, charges, and expenses in connection with the said suit which he might thereafter incur; also that the Plaintiff was indebted to several persons mentioned in the schedule thereto in the amounts set opposite their respective names, and was desirous of securing the repayment thereof; and also that the Plaintiff was now claiming in another action from *Cheesewright* and *Paterson* a large sum in cash and shares in the

Fifeshire Main Collieries, Limited: It was witnessed that the Plaintiff thereby assigned to the said *E. Maccall* the said 100 fully paid-up preference shares in the said company, and also "the cash and shares coming from" *Cheesewright* and *Paterson*, "upon trust, in the first place, to secure to the said *E. Kimber* the payment of any costs, charges, and expenses which may now or at any time hereafter may be due to him in connection with the said Chancery suit and otherwise"; and afterwards for the purpose of securing the sums due to the persons mentioned in the said schedule.

The present action proved successful, and Mr. *Kimber* received, on the Plaintiff's behalf, 185 fully-paid ordinary shares of £5 each and 50 preference shares (of which 35 at present remained unsold) in the *Fifeshire Main Collieries, Limited*, in settlement of the action so far as the Defendant *Cheesewright* was concerned, though, as against the Defendant *Paterson*, the action was still pending.

Mr. *Kimber* now moved for an order for a charge upon the shares in the *Fifeshire Main Collieries, Limited*, at present remaining unsold, which were recovered in this action, and all other the property so recovered in the action, for his costs in this action as the Plaintiff's solicitor, and for an order that such costs should be raised *pro tanto* by a sale, in such manner as the Court should direct, of the said shares, and paid to him.

Renshaw, Q.C., and *Macpherson*, for Mr. *Kimber*:—

The words of sect. 28 of the *Solicitors Act*, 1860 (23 & 24 Vict. c. 127), under which we apply, are general. The section says that "in every case in which a solicitor shall be employed to prosecute or defend any suit," it shall be lawful for the Court "to declare such solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such solicitor, for the taxed costs, charges, and expenses of or in reference to such suit." The charge under that section is independent

KEKEWICH J. 1895 GROOM v. CHEESEWRIGHT.

of any contract: *Greer* v. *Young* (1). The proper form of charging order is given in *Seton* on Decrees (2).

C. E. E. Jenkins, for the Plaintiff:—

The solicitor, having already obtained from his client a mortgage for his costs, is debarred from obtaining a charging order. Such an order would give him rights inconsistent with those under the security which he had elected to accept.

Renshaw, in reply:—

The fact that I have accepted a charge under the mortgage is not a waiver of the right to a charge given me by statute.

KEKEWICH J.:—

It is not my wish to fritter away the decisions on this point upon the construction of the *Solicitors Act*, 1860, or upon the forms of charging orders under it, though, no doubt, the decisions have gone beyond what was originally supposed to be the proper construction of the Act; nor is it my wish to prevent solicitors from getting what the Legislature intended they should have. It appears to me to be only common justice that, when a solicitor has expended his brains and time and resources in working for a client, he should be paid out of the produce of his industry and skill. I certainly do not wish to do away with that. But I have before me this neat point—a point which is not covered by decision. The Plaintiff, Mr. *Groom*, got Mr. *Kimber* to accept, during the progress of the action, a charge for his costs upon the property to be recovered in the action. Of course, subject to the control which the Court exercises over solicitors and their bargains with their clients for their costs, Mr. *Kimber* was entitled to accept a charge upon the property to be so recovered; but at this time, he being Mr. *Groom's* solicitor, by this deed of 1893, which was professedly Mr. *Kimber's* deed, the Plaintiff, Mr. *Groom*, assigned to a trustee, not only whatever property might be recovered in this action of *Groom* v. *Cheesewright*, under the large description of "the cash and shares coming to him from" *Cheesewright* and *Paterson*, but

(1) 24 Ch. D. 545. (2) 5th Ed. vol. ii. p. 929.

also some other property. All that was assigned to a trustee, "upon trust, in the first place, to secure to the said *E. Kimber* the payment of any costs, charges, and expenses which may now or at any time hereafter may be due to him in connection with the said Chancery suit and otherwise," and after that for the purpose of securing certain debts. Of course, under that trust deed the trustee would be entitled to retain, out of the property assigned, his costs, charges, and expenses as trustee; but, subject to that, Mr. *Kimber* accepted a first charge upon this property; and now he asks to have a charging order upon the same property, the only advantage of which would be to give him a footing above the deed which he accepted as a security in 1893. That is, he now says, "before the trustee can get his costs of recovering the property out of which he is to pay my charges, these charges must be paid."

Consider the intention of the Legislature under this Act. The intention is to give the solicitor an ancillary right. It is not intended—and I think the cases all bear me out in this—to displace the liability of the client to pay the solicitor out of his own pocket; and it has been doubted whether a charging order ought to be made at all where the client is a responsible person well able to pay. At any rate, it was not intended that the right of the solicitor to a charging order should be absolute, but that it should be a right ancillary to his right to be paid on his retainer. On the general principle that for a solicitor to accept security for his costs is inconsistent with his right to payment otherwise, it seems to me that Mr. *Kimber* has put it out of his power to get the order he now asks. I have pointed out what would be the inconsistency of it, and, in my opinion, that inconsistency is fatal to his application.

As to the costs of the application, I do not think that a solicitor who comes here to enforce a right given him by statute, but fails on a point of law, ought to be ordered to pay costs. I therefore refuse the application, but without costs.

Solicitors: *E. Kimber; H. W. Christmas.*

G. I. F. C.

KEKEWICH J.

1895

March 7.

TAUNTON *v.* SHERIFF OF WARWICKSHIRE.

[1895 T. 301.]

Company—Debenture—"Floating Security"—Execution Creditor—Intervention by Debenture-holders after Sale but before Money handed over.

Where the goods of a company are taken in execution and sold, but the money is not handed over to the execution creditor, the holder of a debenture constituting a charge by way of floating security upon all the property of the company may still intervene so as to oust the execution creditor.

Dicta of *Lindley* L.J. in *In re Opera, Limited* (1), considered and applied.

Notice of an injunction restraining a sale of a company's goods by the sheriff was not given until after the sale had commenced. Before the sale was actually effected the solicitor of debenture-holders, who were Plaintiffs in a pending action for the enforcement of their security, which comprised the goods, paid the amount claimed to the sheriff's officer under protest and with notice to him not to part with the money:—

Held, that the intervention of the debenture-holders was effectual, and the money belonged to them.

THE Plaintiffs in this action were the holders of twelve out of fifty debentures for £100 each, payable on demand, issued by the *Birmingham Ammunition Company, Limited*, which was formed on the 28th of May, 1892, with a share capital of £15,000, of which £11,875 was issued.

By the debentures, which were dated the 14th of June, 1892, the company charged "the freehold and leasehold premises, plant, stock, licenses, book and other debts, property, goodwill, assets, and undertaking of the company both present and future, including uncalled capital for the time being of the company, as a floating security" for the payment of the principal and interest for the time being due on the debentures. The debentures were issued subject to conditions indorsed on each debenture, one of such conditions being as follows: "The charge created by this debenture shall be a floating security, and shall not hinder any dealings by the company in the course of its business with all the property hereby charged in such manner as the company may think fit, except that the calls made and to be

(1) [1891] 3 Ch. 260.

made upon the preference shares shall not exceed the sum of £2 10*s.* per share without the written consent of the registered holder hereof, and in particular the company may pay and receive money and may declare and pay dividends out of profits. Provided always that nothing herein contained shall be taken to authorize the creation, after the day of the date hereof, of any mortgage or charge on any of the real estate or property for the time being of the company, in priority to the charge hereby created."

On the 9th of February, 1895, the *King's Norton Metal Company*, trade creditors of the *Birmingham Ammunition Company*, recovered judgment against the last-named company for £51 12*s.* and costs; and on or before the 14th of February, 1895, execution under this judgment was levied on the goods and chattels of the same company at its registered offices near *Birmingham*.

On the 16th of February, 1895 (interest on the Plaintiffs' debentures being in arrear, and demand for payment of the principal having been made and not complied with), an action of *Taunton* v. *Birmingham Ammunition Company* [1895 T. 273] was commenced by the Plaintiffs, on behalf of themselves and all other holders of mortgage debentures of the *Birmingham* company, against that company for the enforcement of the Plaintiffs' security and the appointment of a receiver. Notice of the institution of this action was given by the Plaintiffs' solicitor to the sheriff and to the solicitors for the *King's Norton* company, and negotiations were entered into with the view of the latter instructing the sheriff to withdraw. Notice was also given to the sheriff that the goods taken in execution were the property of the Plaintiffs.

On the 20th of February, 1895, the Plaintiffs' solicitor was apprised that the sheriff intended on the following day to proceed with the sale of the goods.

On the 21st of February, 1895, the writ in this action was issued, claiming an injunction to restrain the sheriff from selling the goods, and on an *ex parte* application, an injunction to that effect extending over the next day was obtained from Mr. Justice *Stirling* (to whose Court the action was attached) with leave to serve short notice of motion for that day.

KEKEWICH J. 1895 TAUNTON v. SHERIFF OF WARWICKSHIRE.

Notice of the injunction so granted was immediately sent by telegram to the sheriff's officer, but did not arrive in time to prevent him from proceeding with the sale, which was advertised to take place at the works of the *Birmingham* company on that day. He, however, on his way to the sale called, by arrangement, at the office of the Plaintiffs' solicitor, who thereupon, in order to preserve the property for the Plaintiffs, under protest and without prejudice, handed to the sheriff's officer £70 5*s.* 6*d.*, together with a letter as follows:—

"Referring to the £70 5*s.* 6*d.* paid to you herein under protest, the amount is paid on behalf of my clients the debenture holders, the owners of the goods and effects seized by you in this execution, and I hereby give you notice on their behalf not to part with the money, and I also hereby require you to forthwith issue interpleader summons in respect thereof. The payment is made without prejudice to any rights or remedies that my clients may have in consequence of the threatened sale for compensation or otherwise."

The sheriff's officer thereupon telephoned to his man at the works of the *Birmingham* company instructing him not to proceed with the sale, which accordingly did not take place. Soon after, the sheriff's officer, upon his return to his office, received a telegram containing notice of the injunction.

On the 22nd of February, 1895, a receiver was appointed in the debenture-holders' action.

The motion for an injunction now came on to be heard before Mr. Justice *Kekewich*. By arrangement, and in order to save the expense of interpleader proceedings, the *King's Norton* company were made Defendants to the action, and the motion was treated as the trial of the action upon the issue who was entitled to the money in the hands of the sheriff.

T. B. Napier, for the Plaintiffs:—

It is clear that the goods taken in execution were covered by the debentures, and that the debenture-holders had an equitable charge upon them, of which the sheriff and execution creditor had notice, and the sheriff therefore had no right to sell as

against the debenture-holders. Debentures by way of floating security create a charge from the moment when they are given, subject to a license to the company to deal with the property charged in the ordinary course of its business: *In re Standard Manufacturing Company* (1), practically affirmed on this point by the Court of Appeal in *In re Opera, Limited* (2). The judgment in this case, and the execution upon it, were not a "dealing by the company" in the course of its business. The rights of the execution creditors cannot be put higher than those of the company. In *Edwards* v. *Standard Rolling Stock Syndicate* (3) Mr. Justice *North* expressed himself as feeling a difficulty in interfering with the right of ordinary creditors to levy execution, but he nevertheless appointed a receiver at the instance of debenture-holders having a floating security.

At all events, *In re Opera, Limited*, shews clearly that the execution creditor takes subject to the equity of the debenture-holders.

[KEKEWICH J.:—The question is what is the extent of that equity. His Lordship referred to *Brunton* v. *Electrical Engineering Corporation* (4).]

The equity of the debenture-holders must prevail if their right to enforce their security actively has intervened before the execution is complete. Here the injunction was obtained before the moment of sale. It no doubt arrived too late to prevent the sheriff from selling, but it is sufficient that the debenture-holders have intervened after sale and before the money was handed over. In this respect the *quære* in the head-note in *In re Opera, Limited*, is insufficient. It runs thus: "Whether, after sale by the sheriff, the debenture-holders lose their priority, *quære*." But the words of Lord Justice *Lindley* on which that *quære* was founded are these (5): "What the position of the debenture-holders is after the property is sold and the money handed over, I do not know, and I will not say at this moment." His Lordship, therefore, was referring to the case where not only has a sale taken place, but the money has been handed over;

(1) [1891] 1 Ch. 627, 640, 641.
(2) [1891] 3 Ch. 260.
(3) [1893] 1 Ch. 574.
(4) [1892] 1 Ch. 434.
(5) [1891] 3 Ch. 263.

KEKEWICH J. 1895 TAUNTON v. SHERIFF OF WARWICKSHIRE.

and the fair conclusion to be drawn from his words is that where the money has not been handed over, as is the case here, the equity of the debenture-holders is not displaced, and their intervention is effectual.

Ryland, for the *King's Norton Metal Company*, the execution creditors:—

The execution was complete before there was any such intervention on the part of the debenture-holders as could make their floating security attach to the goods. Such an intervention could only take place by some act affecting the possession of the goods, as, for example, by the appointment of a receiver. The service of the injunction, which ought never to have been applied for or granted, could not constitute such an intervention, or in any way alter the rights of the parties in the goods. The appointment of the receiver was too late and equally ineffectual. The judgment and the execution upon it were a dealing or part of a dealing by the company in the ordinary course of its business. The dealings of the company in the course of its business would obviously be hindered if it could not confer on its business creditors the ordinary rights of creditors against the property of their debtors. The cases cited have therefore no application. [He referred to *Edwards* v. *Edwards* (1).]

Macaskie, and *S. Mayer*, for the sheriff of *Warwickshire*.

Napier, in reply.

KEKEWICH J.:—

The case of *In re Standard Manufacturing Company* (2) cannot be treated as deciding this case. If it were so treated, what was said by Lord Justice *Lindley* in *In re Opera, Limited* (3), would have been unnecessary and irrelevant. He cannot have intended to say that he did not know and could not say at that moment what the law was on a certain point, when he had under his eye and was himself referring to a case in which that point had been decided. That seems to me a complete answer to the

(1) 2 Ch. D. 291. (2) [1891] 1 Ch. 627.
(3) [1891] 3 Ch. 260.

main argument which has been based on *In re Standard Manufacturing Company* (1). That case is, however, valuable as the groundwork of the argument on behalf of these debenture-holders, but only to this extent, namely, that, as Lord Justice *Lindley* in *In re Opera, Limited* (2), puts it in an interlocutory observation, it is a "clear decision that the execution creditor takes subject to the equity of the debenture-holders"; and the question in cases of this kind is what is the equity of the debenture-holders. That is a difficult question, a very short one, but to my mind in many respects different from the questions which have been argued here.

That the execution creditor has rights which are interfered with by the interposition of the Court on behalf of the debenture-holders is perfectly clear, is familiar to all in the applications which are made for the appointment of receivers, and was recognised by Mr. Justice *North* in the case which has been referred to of *Edwards* v. *Standard Rolling Stock Syndicate* (3), where he says: "I feel a difficulty in interfering with the right of ordinary creditors to levy execution." In that case application was made under rather extraordinary circumstances, and Mr. Justice *North* appointed a receiver.

In order to understand what the equity of the debenture-holders is, it is necessary to look at their charge. It is a charge on all the property of the company. One of the conditions is as follows: "The charge created by this debenture shall be a floating security, and shall not hinder any dealings by the company in the course of its business with all the property hereby charged in such manner as the company may think fit." Now I take it that those two sentences, which have often puzzled me, and still puzzle me, mean two different things. I do not understand a floating security to be merely defined as one that "shall not hinder any dealings by the company in the course of its business with all the property hereby charged." It is to be a floating security, and, in addition to that, it is not to hinder the dealings. I am not here concerned with a dealing by the company in the course of its business, but with a judgment, and an

(1) [1891] 1 Ch. 627. (2) [1891] 3 Ch. 260.
(3) [1893] 1 Ch. 574, 576.

KEKEWICH J. 1895 TAUNTON v. SHERIFF OF WARWICKSHIRE.

execution upon that judgment which are the result of dealings in the course of the company's business. That is to say, the company in the course of its business has incurred a debt, judgment has been recovered for that debt, and execution has issued, but the execution is not, and the sale under the execution is not, a dealing by the company. I may, therefore, put that part of the condition aside. Then what is the meaning of a "floating security"? I am not aware of any precise definition and shall not attempt one. It would be quite possible to give the expression an interpretation which would prevent the security of these debenture-holders from attaching to these goods under the circumstances with which I am now dealing. The security was not enforced, the charge was not brought home until after the creditor had issued execution, and had really to all intents and purposes sold the goods, though, as a matter of fact, on or shortly before the arrival of notice of the injunction the execution creditor was paid out by the debenture-holder. Was that an interposition on the debenture-holder's part sufficient to turn the floating or dormant security into what has been called, as a convenient antithesis, an active security? That is the real question. Was his equitable charge then rendered active? Of course, it may very well be said—it has been argued over and over again—that the creditors of a joint stock company, that is to say, the traders who supply the company with goods, must now remember that it is customary for such companies to issue debentures, and they must take care of themselves and not trust the company, knowing that there are or may be debentures which will come ahead of them. On the other hand, it may be argued that it is not honest of a company to deal as a solvent company when, as a matter of fact, there are debentures outstanding which will swamp all the available assets. Those are all matters for consideration. I have here before me an existing charge on this property; I have an honest and diligent endeavour on the part of a creditor to secure some part of this property, and then, before he has got it and before the property has been sold and the money handed over, the debenture-holder comes in, and then who is to have the money in the hands of the sheriff? Upon that question the

head-note to the case of *In re Opera, Limited* (1), seems, though under the form of a "*quære*," to be in favour of the execution creditor. It says, "whether, after sale by the sheriff, the debenture-holders lose their priority, *quære*." Those words indicate a view which is to be found in the judgment of Lord Justice *Lindley*, but when the words which he uses are referred to it appears that the point which he reserves is not that which is mentioned in the head-note. His words are these: "What the position of the debenture-holders is after the property is sold and the money handed over, I do not know, and I will not say at this moment." That is not the question for decision here. I have to decide what is the position of the debenture-holder after the property is sold, and before the money is handed over. That is an entirely different question. I think that I ought to give on a question of difficulty, as to a novel point of this kind, full effect to the Lord Justice *Lindley's* language, and to credit him with meaning exactly what he said, and I think the fair and sufficient conclusion from what he said is that if the property is sold and the money not handed over, the equity of the debenture-holder is not displaced—that is to say, the execution creditor is subject to that equity. That seems to me to be the proper conclusion from what the Lord Justice said. He did not, as I am well aware, decide this, but he stated it in such a way as to give me a guide on a point of novelty and difficulty. I regret, if I may say so, that as the amount involved is small we shall probably not have the advantage of the opinion of the Lord Justice in revision. I think that in the present case the equity of the debenture-holders is not displaced; and the sheriff must, therefore, pay the money, after deducting his costs, including his costs of attendance in Court to-day, to the receiver who has been appointed in the debenture-holders' action.

Solicitors: *Barlow & James*, agents for *P. M. Butlin, Birmingham; Belfrage & Co.*, agents for *Reece, Harris, & Harris, Birmingham; Taylor, Hoare, & Pilcher.*

(1) [1891] 3 Ch. 260, 263.

C. C. M. D.

KEKEWICH J.

1895

March 5, 14.

BONHOTE *v.* HENDERSON.

[1894 B. 3870.]

Settlement—Voluntary Deed—Rectification—Action—Trial, Mode of—Evidence—Intention.

The Court is reluctant to try actions for rectification of deeds except on oral evidence, unless there are circumstances which, in its opinion, justify a trial on affidavit evidence, such as where final written instructions are proved, and it is clear that the deed as executed departed from them.

The Court has jurisdiction, in a proper case, to reform or rectify a voluntary settlement, as well as a settlement for value: but the Court will hesitate to rectify a voluntary settlement at the instance of the settlor merely on his own evidence as to his intention, unsupported by other evidence, such as written instructions, even though the rectification sought would bring the settlement more into harmony with recognised precedents, and with what the settlor might reasonably have intended at the time.

THIS was an action to rectify a voluntary settlement made by a deed-poll or declaration of trust, dated the 15th of July, 1880, executed by the Plaintiffs, two maiden sisters, and their nephew, the Defendant Mr. *John Henderson*. By the deed it was declared that Mr. *Henderson* should stand possessed of two sums of £8000 each (being portions of moneys coming to the Plaintiffs out of the estate of a deceased brother) as to the first sum of £8000 upon trust for investment, and after a trust of the income for *Anna Maria Henderson*, spinster, a niece of the Plaintiffs, during her life, upon trust, as to both income and capital, for such of her children as she should by deed or will appoint, and in default of such appointment upon trust for her children at twenty-one equally; and in case of her death without leaving a child who should attain twenty-one, then, if she survived her sister, *Emily Henderson*, upon trust for such persons as the said *Anna Maria Henderson* should by will appoint, and in default of such appointment upon trust for the persons who at the decease of the said *A. M. Henderson* should be her next of kin according to the statutes: but if the said *Emily Henderson* should survive the said *A. M. Henderson*, then, subject to the trusts therein-

before declared in favour of the children of the said *A. M. Henderson*, upon trust to pay the income of the said sum of £8000 to the said *E. Henderson* during her life, and after her death, as to both capital and income, upon trust for such of her children as she should by deed or will appoint, and in default of such appointment, for such of her children as should attain twenty-one equally, and in case of her death without leaving a child who should attain twenty-one, upon trust for such persons as she should by will appoint, and in default of appointment for the persons who should at her death be her next of kin according to the statutes: and as to the second sum of £8000 upon similar trusts to those thereinbefore declared with regard to the first sum of £8000, the name of the said *E. Henderson* being substituted for that of the said *A. M. Henderson*, and the name of the said *A. M. Henderson* for that of the said *E. Henderson*. The deed contained no power of revocation.

By another deed-poll of even date and executed by the Plaintiffs, and by their then solicitor Mr. *George Dawes* (since deceased), as trustee, it was declared that the said *George Dawes* should stand possessed of a third sum of £8000 upon trust for *Mary Wilson*, wife of *Henry Walter Wilson*, another niece of the Plaintiffs and a sister of the said *A. M. Henderson* and *E. Henderson*, for her life for her separate use, and after her death, as to both capital and income upon trust for such persons as she should by will appoint, and in default of such appointment, upon trust for such of her children as should attain twenty-one equally, and in case of her death without leaving a child who should attain twenty-one, upon trust for such persons who should at her death be her next of kin according to the statutes.

A sum of £1000 was subsequently added by the Plaintiffs to each of the two sums of £8000 settled by the first deed, making up the total settled sum in each case to £9000.

The Plaintiffs had recently discovered, so they alleged, that this deed did not carry out their real intention, which was, they said, that each of their two unmarried nieces should, in default of her having children, have the right to dispose of the capital of her fund as she pleased by will, and not that the power of disposition over both funds should, on the death of one niece

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without children, go over to the surviving niece. Accordingly in August, 1894, they issued the writ in this action, claiming that the deed might be rectified by giving to each tenant for life thereunder an absolute testamentary power of appointment in default of children attaining a vested interest over the fund settled on her for life.

The Plaintiffs' case was supported by three affidavits, consisting of a joint affidavit of the Plaintiffs themselves, an affidavit by Mr. *Richard Dawes*, a member of the firm of Messrs. *Dawes & Sons*, the Plaintiffs' solicitors, and an affidavit by Mr. *Ernest Balfour Trotter*, a solicitor, who had been a clerk to Messrs. *Dawes & Sons* at the time of the preparation of both deeds.

The Plaintiffs' affidavit stated that the deed now in question, being the settlement in favour of their two unmarried nieces, was prepared (as also the settlement on Mrs. *Wilson*) under the supervision of their then solicitor, Mr. *George Dawes*, since deceased, a member of the firm of Messrs. *Dawes & Sons*, and that the draft was perused and revised in his private capacity by their nephew the Defendant, Mr. *John Henderson*, who was a member of the equity bar, and who had, at their request, consented to be a trustee of the two sums on behalf of the two nieces, who were his sisters: that previous to the preparation of the deed they, the Plaintiffs, gave Mr. *Dawes* "our general personal instructions as to its purport and effect, our desire and intention being that our nieces respectively should have the benefit of the income during their lives . . . . and that the capital should go after their deaths to their children (if any), and, if they had no child, that each should have the right to dispose of the capital as she pleased. We never gave any instructions to the said *George Dawes* that the destination of the capital in the event of either niece dying without leaving a child to acquire a vested interest should be, as we are informed it is, by the deed, nor did we discuss this point with the said *John Henderson*. In confirmation of the above we say that soon after the deed was prepared we advised our said nieces to make their wills, believing that they had power to do so over each fund, but they at the time declined to do so. Until recently we always imagined that the deed was framed as we desired, but a

short time since it was brought to our knowledge by our said nieces that, in the event of the death of one of them without leaving a child, the income of the said £9000 to which such niece was entitled during her life is, by the terms of the document, payable to her surviving sister, and that the capital will be payable to the children (if any) of such surviving sister, and if she should leave no child then that she has power to dispose of the capital of both sums of £9000 by her will. And we say that this was not our intention, nor was it our understanding of the nature of the document, nor was it ever explained to us, either before its preparation or at the time we signed it, that such was its effect. In the event of either of our nieces dying without a child to take the fund, our wish was that she should have had power to leave the fund as she pleased by her will. We say that the document so framed does not carry out our wishes or intentions, and that, had its effect been explained to us at the time it was brought to us for signature, we should not have signed it in its present form, but should have required it to be altered to meet our views as above expressed, and we are desirous that it should be altered accordingly."

Mr. *Richard Dawes* by his affidavit proved certain entries in a waste book in the handwriting of his former partner, Mr. *George Dawes*, who died in December, 1887. These entries, so far as they related to the matter in question, were seven in number. The first, dated the 25th of June, 1880, was "attending the Misses *Bonhote*, taking instructions for codicils to their wills, and also for preparing a declaration of trust with reference to certain gifts from out of the property derivable from their brother's estate to certain relations." Other entries related to sending the drafts of the two settlements to Mr. *Henderson* with a letter asking him to look them through and see that they were in accordance with his aunt's views. Another was as to attending the Plaintiffs with the "declarations of trust and reading over that in favour of Mrs. *Wilson*," and attesting their signatures. The last entry, dated the 16th of July, 1880, was as to attending Mr. *Henderson* with the deed of which he was trustee, for his signature.

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Mr. *Trotter* stated in his affidavit that in 1880 he was clerk to Messrs. *Dawes & Sons*, and received verbal instructions from the late Mr. *George Dawes* to prepare the draft of the declaration of trust in favour of the Plaintiffs' two unmarried nieces, which he did, and that the draft declaration of trust in favour of Mrs. *Wilson* was prepared by his directions: that he never himself saw the Plaintiffs in connection with the deed now in question, nor received any instructions from them in relation thereto: that he had an interview with the Defendant, Mr. *Henderson*, on the 13th of July, 1880, in reference to the drafts, but at this distance of time was unable to say what passed, beyond his going through the drafts with him.

The Defendant, Mr. *Henderson*, also filed an affidavit, in which he stated that prior to and in the year 1880 the Plaintiffs, his aunts, were in the habit of consulting him on any matters of importance, and that they then, and had ever since, very much depended on his advice and judgment: and that he had been and was on most intimate terms with them, and in the year 1880 was in the habit of seeing them almost every week, and when any matter of importance was concerned he saw them more frequently. He then further stated that in the year 1880, the Plaintiffs being desirous of making settlements on his married sister and his two unmarried sisters, he advised them generally as to the form the settlements should take: that the settlements were prepared under the supervision of Mr. *George Dawes*, the Plaintiffs' family solicitor, and that Mr. *Dawes* sent him, Mr. *Henderson*, the drafts for perusal, when he introduced an overriding power of appointment by will after the trusts for children. He then identified two letters written by him to Mr. *George Dawes* with reference to the two drafts, and both dated the 12th of July, 1880. The first he wrote was on returning the drafts to Mr. *Dawes*, and referred to the alterations he had made, suggesting that Mr. *Dawes* should see his aunts upon them; and he added, "I am about to have a little talk with my aunts this afternoon." In his second letter of the same day Mr. *Henderson* said that, since writing his former letter, "I have had a long conversation with my aunts about the proposed settlements:"

that they approved of his alterations in the *Wilson* settlement; and that "the settlement on my unmarried sisters will remain as settled by me, unless you think it advisable to consult them yourself on my alterations before execution." Mr. *Henderson* then deposed that he could not now remember whether he observed that the effect of his alterations in the draft settlement of his two unmarried sisters was to make the power of disposition by will in the case of each sister who should die without a child attaining a vested interest dependent on her surviving the other: but that he felt perfectly certain that he never discussed the point with the Plaintiffs, or gave them any advice upon it: that he felt sure that, between the time he altered the draft and the time the deed was signed (which was very shortly afterwards), he did not explain to the Plaintiffs how the trusts would work out on the death unmarried, or without a child attaining a vested interest, of such of his two sisters as should first die, or that she would have no power of disposition over the fund: and that from the execution of the settlement until the present question was raised, the effect of the settlement in either of the events last mentioned was not, he believed, ever present to his mind. No record was forthcoming of any interview with the Plaintiffs upon the subject of Mr. *Henderson's* alterations.

Upon this affidavit evidence the case came on before his Lordship for trial, as a non-witness action, on the 29th of January, 1895, but on hearing the affidavits his Lordship was not satisfied that a case for rectification had been made out by them, and he accordingly directed that the action should be put into the witness list in order that the several deponents might be cross-examined on their affidavits.

The action accordingly came on for trial as a witness-action on the 5th of March, 1895, but a medical certificate was then produced to the effect that it was impossible for either of the Plaintiffs to attend for cross-examination, since one was over seventy-four, and the other over eighty, years of age, and both were in very infirm health.

Mr. *Trotter* was cross-examined at considerable length, but he was unable to throw much further light upon the matter. Mr. *Henderson* was not cross-examined.

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Warmington, Q.C., and *Kirby*, for the Plaintiffs, contended that the evidence sufficiently shewed that the clause vesting the ultimate power of disposition by will in the sister who should survive the other dying without a child, was not in accordance with the Plaintiffs' intention, which was the very reasonable one, and more in accordance with precedent in such cases, that the two funds should be kept separate, each sister having a power of disposition over her own fund.

Badcock, for the Defendant.

1895. March 14. KEKEWICH J.:—

The jurisdiction of the Court to reform, or, as the phrase generally goes, to rectify, deeds, is ancient and original. The principles on which it depends, and according to which it is exercised, have been so often and so fully stated, and moreover are so familiar to all practitioners, that it would be waste of time to attempt exposition here. Suffice it to say, that a judgment reforming a deed proceeds on the basis that the deed as it stands does not express the real bargain between the parties, of which real bargain the Court has satisfactory evidence. This, of course, is not directly applicable to voluntary deeds; that is, deeds made without valuable consideration, where, therefore, there is no bargain capable of proof. It is within my knowledge that the extension of the jurisdiction to deeds of this character was not always regarded with favour or as sound, but it was upheld by the Court of Appeal in *Walker* v. *Armstrong* (1) (famous for an example of Lord Justice *Knight Bruce's* humour), and not without discouragement from an eminent equity counsel. I myself assisted to establish it in *Courthope* v. *Daniel*, reported with *Daniel* v. *Arkwright* (2). Given the extended jurisdiction, it is obvious that the Court must approach the exercise of it with caution at least equal to that required in dealing with the investigation of bargains; and the difficulty is necessarily increased by the circumstance that in the nature of things the Court cannot have the same advantages of criticism and opposition. If there are documents, such as written instructions,

(1) 8 D. M. & G. 531. (2) 2 H. & M. 95.

evidencing the intention of the parties, the course may be clear; but if that intention rests on statements of settlors made, perhaps, long after the date of the deed, when haply precise memory is wanting and circumstances have changed, it behoves the Court to act warily. It may be too much to say that no effect is to be given to a statement on oath that if the settlor had known the deed to be what it is he or she would not have executed it.

But the operation of the human mind is so complex, so easily swayed first by one motive and then by another, that I hesitate to attribute much effect, and I decline to attribute cogent force, to the belief and opinion—for really it is no more—that something would or would not have been done in years gone by in possible events which did not in fact occur. Before dealing with merits, it is well to mention one point of procedure.

The case was first heard as a non-witness action on affidavit evidence. I declined to grant the relief asked, not only because not satisfied that a case for rectification was made on the evidence as it stood, but also because I am extremely reluctant to hear any case of this character on affidavit evidence. I must not be understood as saying that it never can be done: on the contrary, I have often done it, and am prepared to do it again where the circumstances, in my judgment, justify that course; as, for instance, where written instructions are proved, the deed as executed departs from them, and there is no reason to doubt that they were final. It must, too, be remembered that in the Court of Chancery, on which we depend for our authorities on this branch of law, suits were heard and determined on evidence of this character. But I am satisfied that in a large majority of cases it is unsafe and unwise to dispense with oral evidence, and I frequently decline to do it. That it is competent for the Court to require oral evidence is settled. The question was fully discussed in *Lovell* v. *Wallis* (1), and although I then entertained, and still entertain, some doubt whether Mr. Justice *Kay* was right in refusing relief, I am sure that he took the proper course in having the evidence thrashed out in the witness-box. A perusal of the report on the trial (2) fully supports this conclusion. Unfortunately in this case the infirmities of the

(1) 53 L. J. (Ch.) 494. (2) 50 L. T. (N.S.) 681.

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Plaintiffs have rendered it impossible to cross-examine them, or to obtain from them information on the points which their affidavit leaves at large; and, Mr. *George Dawes* being dead, the only available witness was Mr. *Trotter*, his former clerk. I must therefore do my best with the affidavit evidence and exhibits, supplemented by such information as Mr. *Trotter* was able to give. These materials were fully considered when the case first came before me, and have been reconsidered in connection with the cross-examination of Mr. *Trotter*. But although involving some details worth investigation, they may, for the present purpose, be briefly stated.

The Plaintiffs were minded to make provision for their three nieces, one married and the other two unmarried; and it was determined to do this by settlement rather than by absolute gift. They had the assistance of a thoroughly competent solicitor, and also of the Defendant, Mr. *Henderson*, an equity counsel, a nephew, and a trusted friend, who gave them the full benefit of his experience and advice in that character. The relative positions of the Plaintiffs and Defendant were well known to the solicitor, Mr. *George Dawes*; and, it may be assumed, also to his clerk, Mr. *Trotter*; and this fact, I think, accounts for the absence of explicit entries and letters which might otherwise be expected to throw light on the transaction. Indeed, the inference from the proved circumstances is that in the later stages of the transaction Mr. *Dawes* and his clerk treated themselves as doing little, if anything more, than carry out ministerially arrangements made between the Plaintiffs and Defendant; and on the facts before me it is impossible to say that they were not in this perfectly right. Both drafts were carefully settled by the Defendant. There appears to have been more discussion, both before this and subsequently, respecting the settlement in favour of Mrs. *Wilson*; but, looking at the drafts themselves, and the Defendant's letters to be presently mentioned, it is clear that both drafts had the Defendant's best attention and care. It seems to me to be useless narrowly to inquire what had been previously said respecting the contents of the particular settlement, because, confessedly, the point now in question had not then really been considered. In returning the settled drafts

to Mr. *Dawes* on the 12th of July, 1880, the Defendant wrote the first letter of that date in which alterations in both drafts were referred to, and an interview between Mr. *Dawes* and the settlors thereon was suggested. He added that he was about to have a little talk with the Plaintiffs that afternoon. If the matter had rested there, I should have been at a loss to understand why Mr. *Dawes* did not see the Plaintiffs before having the settlements engrossed, and explain and take their instructions on the alterations made; or why no entry of any such attendance or explanation is to be found in the waste books of the firm. But later in the day a second letter was addressed by the Defendant to Mr. *Dawes*. In this he states that since writing the former letter he had had a long conversation with the Plaintiffs about the proposed settlements, and as regards that now in question, says: "the settlement on my unmarried sisters will remain as settled by me, unless you think it advisable to consult them yourself on my alterations before execution." It is clear from the entries that Mr. *Dawes* did not think it necessary to consult the Plaintiffs, and that both settlements were engrossed without further instructions. It must be concluded, too, that no explanation of the particular settlement was given at the time of execution, and that it was not even read over, although that in favour of Mrs. *Wilson* apparently was. Mr. *Henderson's* recollection of what took place at his interview with the Plaintiffs on the 12th of July is not precise. This is not unreasonable, far from it; but it leaves a void in the history which cannot otherwise be supplied. I understand from his affidavit that he did not fully explain the particular settlement, and probably did not dwell on, if he at all pointed out, the testamentary power which has given rise to the present litigation.

Is it possible for me to say that the Plaintiffs did not assent to the settlement as altered by the Defendant, or to hold that they are now entitled to have it rectified according to what they state their intention to have then been, though it was in nowise expressed? It is possible, and indeed probable, that they did not thoroughly understand how the provisions of the settlement would or might work out, and even careful explanation might have failed to make them grasp the possible results.

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What I think most likely is, that they were content to adopt and act on Mr. *Henderson's* advice, and to believe that the settlement was best in the form into which he had altered it.

At any rate, I do not see my way to reforming a deed on these the only available materials, notwithstanding that now it operates otherwise than is wished, and even though, as was strongly urged, the proposed rectification would bring the settlement more into harmony with recognised precedents, and the reasonable views of ladies desiring to make provision for unmarried nieces. The action must be dismissed.

Solicitors: *Dawes & Sons.*

G. I. F. C.

In re NEW ORIENTAL BANK CORPORATION (No. 2).

VAUGHAN WILLIAMS J.

1895

Feb. 27; *March* 6, 13.

[0038 of 1892.]

Company—Winding-up—Bankruptcy—Proof by Lessor—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.

The rule laid down in *Hardy* v. *Fothergill* (1) does not apply where a lessor is proving in respect of the liability of his lessee under a subsisting lease, whether the lessee is an insolvent company which is being wound up, or is a bankrupt; and in the case of an insolvent company in liquidation *In re Haytor Granite Company* (2) and *Horsey's Claim* (3) are still applicable.

And where such a company was the lessee of land for a term of fourteen years, with a power to determine the lease at the end of seven years on paying the rent and performing the covenants up to the date of the term being so determined, and the winding-up took place before the end of seven years, it was

Held, that the lessor was entitled to claim in respect of the liability of the company as if the lease had been for fourteen years certain.

Ex parte Blake (4) distinguished.

By a lease dated the 25th of October, 1890, the *Hong Kong Land and Investment Company, Limited,* demised to the *New Oriental Bank Corporation, Limited,* a building at *Hong Kong,* for fourteen years from the 1st of April, 1890, at a yearly rent. The lease contained a covenant by the lessees to pay the rent as it became due, and to keep the premises in repair, and also a proviso that the lessees might, at the end of the seventh year of the term, determine the lease upon giving the lessors "at least six calendar months' notice in writing prior to the determination of the said seventh year of their intention so to do, and paying the rent and performing and observing the covenants by the lessees herein contained up to the date of the said term being so determined."

The corporation took possession of the premises, and paid the rent down to May, 1892; but on the 23rd of June, 1892, it passed an extraordinary resolution in favour of voluntary winding-up, and on the 5th of July, 1892, Mr. Justice *Vaughan*

(1) 13 App. Cas. 351.
(2) Law Rep. 1 Ch. 77.
(3) Law Rep. 5 Eq. 561.
(4) 11 Ch. D. 572.

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Williams made an order continuing the voluntary winding-up, but subject to the supervision of the Court.

The corporation was insolvent. The liquidator remained in possession of the premises, and paid the rent down to October, 1893, when he gave up possession and handed the keys of the premises to the lessors' agents; but, inasmuch as no agreement could be arrived at as to the terms on which the corporation should be freed from further liability under the lease, possession was only accepted without prejudice to the rights of the lessors in respect of the future liabilities of the corporation under the lease.

A summons was taken out by the lessors, raising the question what amount they were entitled to claim and prove for in the winding-up in respect of the liability, present and future, of the corporation under the lease.

Buckley, Q.C., and *W. E. Capron*, for the Applicants:—

The lessees cannot put an end to the lease at the end of seven years unless they have then performed their obligations under it, including the obligation to pay the rent for seven years in full. If that payment is not made, the lessors have the right to claim in respect of rent for the whole residue of the term of fourteen years, and for possible breaches of covenants. The lessors can enter a claim for the whole value of the future rent; and as each instalment becomes actually due they will be entitled to a dividend in respect of the amount of the instalment: *In re Haytor Granite Company* (1); *Horsey's Claim* (2); *In re Gartness Iron Company* (3); *Lord Elphinstone* v. *Monkland Iron and Coal Company* (4). The rule in winding-up, as regards a lessor's proof, is different from that in bankruptcy. In the former case the lease does not vest in the liquidator, whereas in bankruptcy it vests in the trustee.

R. J. Parker, for the liquidator:—

The lease must be given up, and the lessors can only prove for the loss thereby sustained by them, having regard to the fact that the lease is determinable at the end of seven years.

(1) Law Rep. 1 Ch. 77.
(2) Ibid. 5 Eq. 561.
(3) Law Rep. 10 Eq. 412.
(4) 11 App. Cas. 332.

[VAUGHAN WILLIAMS J.:—Payment of the rent in full for seven years is a condition precedent to the right to determine the lease at the end of seven years. The lease must be treated, therefore, as one for fourteen years.]

The fact that there is a right to determine the lease at an earlier date cannot be disregarded in determining the amount of the lessors' claim for the loss sustained by an immediate surrender. In bankruptcy the right of the lessee to determine the lease before the full term has expired is taken into account in determining what amount may be proved for: *Ex parte Blake* (1). The proof should be admitted only for future rent, less the benefit which the landlord obtains by getting his property back again; that is to say, he is in the position of a secured creditor.

The company being insolvent, sect. 10 of the *Judicature Act*, 1875, renders applicable the rules as to proving debts under the law of bankruptcy; and in bankruptcy the future and contingent liability on covenants in a lease is a debt which may be proved, and which, if not proved, is barred by the order of discharge: *Hardy* v. *Fothergill* (2). *In re Haytor Granite Company* (3) and *Horsey's Claim* (4) were both decided before the passing of the *Judicature Act*, 1875, and are inconsistent with the bankruptcy rule laid down in *Hardy* v. *Fothergill*, which by the Act must now be observed in administering the estates of insolvent companies. The question whether *Hardy* v. *Fothergill* applies to proofs in a winding-up was left open in *Craig's Claim* (5). Lord Justice *Lindley*, in delivering the judgment of the Court of Appeal, after referring to *Horsey's Claim*, said: "But after the decision of the House of Lords in the case of *Hardy* v. *Fothergill*, which must be considered in connection with sect. 10 of the *Judicature Act*, 1875, it is difficult, if not impossible, to say that Mr. *Craig*"—who was the lessee—"could not have had his claim valued and have proved for its value against the old company" (6).

Buckley, in reply:—

Ex parte Blake was a bankruptcy case. The trustee could

(1) 11 Ch. D. 572.
(2) 13 App. Cas. 351.
(3) Law Rep. 1 Ch. 77.
(4) Law Rep. 5 Eq. 561.
(5) *Ante*, p. 267.
(6) *Ante*, p. 275.

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have disclaimed the lease, and it was assumed that the lessee would have done so when seven years had expired; but a liquidator has no power to disclaim, and the lessors are not bound to accept a surrender of the lease. If *Hardy* v. *Fothergill* (1) applied, the lessors could prove for the rent till the end of the fourteen years. But in *Hardy* v. *Fothergill* the assignee of a lease, not the lessee, had liquidated and obtained his discharge, and the discharge was held to bar the lessees from suing on the assignee's covenant of indemnity to recover the amount which they had had to pay the lessor for the assignee's breaches of covenant, on the ground that the liability could have been proved for.

[VAUGHAN WILLIAMS J.:—The case does not apply where the lessor is proving on the estate of his lessee in respect of an existing lease. In *Hardy* v. *Fothergill* the lease had expired, and the assignee actually obtained his discharge before the lessee claimed to be indemnified. In bankruptcy there would be no difficulty in dealing with the proof; but in winding-up the term is still vested in the company. *Hardy* v. *Fothergill* is not a decision that, without more, all future rent can be proved for at once in a winding-up.]

The lessor is entitled to have a claim entered for the full amount of the rent till the end of the fourteen years, and to prevent the company from being dissolved without notice to him: *Lindley* on Companies (2).

[VAUGHAN WILLIAMS J.:—In *Craig's Claim* (3), Lord Justice *Lindley* intimates that *Hardy* v. *Fothergill* has altered the law as to proofs in winding-up. If a lease is subsisting when the lessee is adjudicated a bankrupt, how can the lessor prove immediately? He cannot have both the rent and possession. *Hardy* v. *Fothergill* seems to apply only where there is a disclaimer. But in winding-up the liquidator cannot disclaim, and the rule can only be applied in winding-up where there is a surrender or a repudiation of the lease which is accepted by the lessors.]

That is our contention, and that the old cases are still law. The lessors will only accept a surrender on certain terms.

(1) 13 App. Cas. 351. (2) 5th Ed. p. 731.
(3) *Ante*, p. 267.

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VAUGHAN WILLIAMS J.:—

As the liquidator will not accept your terms, and cannot be forced to do so, the matter must be dealt with on the footing of there being a subsisting lease. To such a case *Hardy* v. *Fothergill* (1) has no application. I can, therefore, only allow a proof for the breaches which have occurred up to the present time. In my judgment, if a company which is in liquidation remains in beneficial occupation of a lease—that is to say, if it occupies the demised premises, or takes the rent, and thus obtains the benefit of the lease—the Court ought to do its very best to make the company pay the rent in full, and not merely a dividend. The principle of *In re Haytor Granite Company* (2) and *Horsey's Claim* (3) applies to the present case; and if the company is in beneficial occupation, I go further, and say that the lessors can enter a claim for the full rent. I say this to assist the parties to come to an agreement; but the most reasonable course would be for the bank to surrender the lease now, and allow the lessors to prove for the rent till the end of seven years.

Buckley:—

The lessors claim rent to the end of fourteen years, and cannot be forced to accept a surrender.

VAUGHAN WILLIAMS J.:—

Then you must enter a claim for the whole of the future rent, and prove for the breaches which have taken place up to the present time. That is all I have to decide now.

Solicitors for the claimants: *Trinder & Capron.*

Solicitors for the liquidator: *Hollams, Sons, Coward & Hawksley.*

(1) 13 App. Cas. 351. (2) Law Rep. 1 Ch. 77.
(3) Law Rep. 5 Eq. 561.

F. E.

VAUGHAN WILLIAMS J.

1895

March 13, 20, 21.

In re LONDON METALLURGICAL COMPANY.

[00132 of 1893.]

Company—Winding-up—Costs of Successful Litigant—Priority—Right to Immediate Payment—Companies (Winding-up) Rules, 1890, *r.* 31.

Rule 31 of the Companies (Winding-up) Rules, 1890, does not affect the priority which under the old practice attached to costs ordered to be paid by the liquidator out of the assets of the company to a successful litigant, and the costs directed to be paid by an order in that form are *primâ facie* payable immediately and in full out of the net assets of the company.

The *onus* is on the liquidator to shew that the condition of the assets is such that immediate payment cannot be made; and if he shews that other persons have a prior right to, or are entitled *pari passu* with the successful litigant, no order for payment will be made without providing for the other claims.

The date of the order gives no priority, but payment will not be indefinitely postponed until all claims have come in.

In re Home Investment Society (1) and *In re Dominion of Canada Plumbago Company* (2) followed.

Ex parte Percival (3), *In re Dronfield Silkstone Coal Company* (No. 2) (4), and *Ex parte Clitheroe* (5), not followed.

ON the 18th of May, 1893, an order was made for the winding-up of the *London Metallurgical Company, Limited.*

The liquidator placed the name of *George Marcus Parker* on the list of contributories; and on the 23rd of February, 1894, *Parker* took out a summons to have his name removed from the list.

On the 11th of April, 1894, an order was made for the removal of *Parker's* name from the list, and directing that the liquidator should, "out of the assets of the company," pay to the Applicant his taxed costs of the application; and that the costs of the liquidator, including what he should so pay to the Applicant in pursuance of that order, should be his costs in the winding-up. The liquidator had a sum of £974 13*s.* in hand, but the costs of realization in the winding-up had not been paid, and were believed to be large, and another order in similar terms and

(1) 14 Ch. D. 167.
(2) 27 Ch. D. 33.
(3) Law Rep. 6 Eq. 519.
(4) 23 Ch. D. 511.
(5) 15 L. R. Ir. 47.

prior in date to that obtained by the Applicant had been made on a summons taken out by another alleged contributory. The liquidator had also commenced three actions, in each of which he had been required to pay into Court a sum of £50 as security for costs.

Under the circumstances the liquidator refused to accede to *Parker's* demand for immediate payment of his taxed costs, and *Parker* took out a summons in the winding-up, asking that the liquidator might be ordered forthwith to pay to the Applicant, out of the assets of the company, the sum of £13 2*s.* 2*d.*, the amount of the Applicant's taxed costs under the order of the 11th of April, 1894, and to pay to the Applicant the costs of this application personally.

R. Younger, for the Applicant:—

The Applicant is entitled to immediate payment of his taxed costs. The order does not direct payment of them to be postponed. Strictly speaking, they are not costs of the winding-up, but costs incurred by the liquidator in an unsuccessful litigation with a third party, which must be paid in priority to the costs of the winding-up: *In re Home Investment Society* (1). Mr. Justice *Chitty* treated that case as not laying down a general principle, but as deciding that the costs to which a person had been improperly put by adverse litigation must be paid in priority to the costs of winding-up; and held that, in respect of costs paid by the liquidator to a person whose name had been taken off the list, the liquidator must stand rateably with other claimants if the assets were deficient: *In re Dronfield Silkstone Coal Company* (No. 2) (2). Mr. Justice *Pearson*, however, refused to consider the first case as distinguishable from the second, and declined to follow Mr. Justice *Chitty's* decision; he held that the liquidator was right in paying the costs immediately out of funds then in hand without providing either for costs of realization or general costs of winding-up, and his decision was affirmed: *In re Dominion of Canada Plumbago Company* (3). In *In re Home Investment Society* the order was that the costs should be paid out of the

(1) 14 Ch. D. 167, 170. (2) 23 Ch. D. 511, 522, 524.
(3) 27 Ch. D. 33.

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assets, and in *In re Dominion of Canada Plumbago Company* (1) the order was that the liquidator should pay the costs and be at liberty to retain the amount out of the assets. The case last mentioned shews that the liquidator, under the form of order there made, is entitled to repay himself in priority, and that the effect of either form of order is the same.

Mr. Justice *Kekewich* considered the two forms of orders as being different in effect: *In re Staffordshire Gas and Coke Company* (2). That opinion seems to be inconsistent with *In re Dominion of Canada Plumbago Company.*

Moreover, where the assets are insufficient, the Court may order payment of costs out of the estate in such order of priority as it thinks fit: *Companies Act,* 1862, s. 110. The power to do this is not affected by rule 31 of the Companies (Winding-up) Rules, 1890.

[He also referred to *Palmer's* Winding-up Forms (3); *Buckley* on Companies (4).]

Ashton Cross, for the liquidator:—

The three forms of order for payment of costs are—(1.) that the company is to pay; (2.) that the liquidator is to pay, and retain the amount out of the assets; and (3.) that the liquidator is to pay the amount out of the assets. An order in form 3 does not entitle a successful litigant to immediate payment, and gives no right to payment in priority over those who obtain similar orders previously, or at the same time, or subsequently. All the persons obtaining the orders obtain the right to payment *pari passu,* and they are only entitled to be paid in due course of administration, after the amount of assets has been ascertained, and subject to certain costs and charges to which priority is given, though of course ordinary creditors cannot compete with those who have obtained orders for costs. The policy of the winding-up clauses of the *Companies Acts* is to create a fund which is to be equitably distributed. The Court controls the distribution of the fund, and will not allow the ignoble scramble which would follow if it were decided that the person who first obtained

(1) 27 Ch. D. 33.
(2) [1893] 3 Ch. 523, 526.
(3) 2nd Ed. p. 193.
(4) 6th Ed. p. 296.

an order for payment of costs was to be paid in full without regard to the claims of other people. Sects. 85 and 87 of the *Companies Act*, 1862, were passed to prevent piecemeal distribution by bringing actions and issuing execution therein. Moreover, such a practice would open the door to fraudulent collusion between a litigant and a friendly liquidator, and would fetter a liquidator's action, for he would not venture on a heavy litigation, say for misfeasance, if litigants in other proceedings might, from time to time, come and sweep away the available assets.

It does not follow, because the liquidator has in his hands enough to pay the costs, that immediate payment must be made, for the liquidator's and petitioner's costs must be paid first, and priority is not obtained by a person whose order is earlier in date than that of another person: *Ex parte Percival* (1). The authority of this case is recognised in *Buckley* on Companies (2).

[VAUGHAN WILLIAMS J. referred to p. 243 of the same book.]

An order for payment out of the assets does not "create a charge" on them, nor is the priority according to the dates of the orders; it "gives a right to get paid out of the assets in a due course of administration, and nothing more": *per Jessel* M.R., *Cape Breton Company* v. *Fenn* (3). Mr. Justice *Chitty* held that to be "a correct statement of the practice of the Court with reference to orders of this class," and properly distinguished *In re Home Investment Society* (4): *In re Dronfield Silkstone Coal Company* (No. 2) (5). In *In re Dominion of Canada Plumbago Company* (6), Mr. Justice *Pearson* misunderstood *Ex parte Smith* (7), where the costs were ordered to be paid in an action brought by the liquidators. Different considerations apply to an action, which is external litigation, from those applicable to proceedings in a winding-up for the removal of a name from the list of contributories. These proceedings are internal litigation, and any order in them made against the liquidator is now against the assets only, as he stands in a *quasi*-judicial position: *Salisbury-Jones and Dale's Case* (8).

(1) Law Rep. 6 Eq. 519.
(2) 6th Ed. p. 251.
(3) 17 Ch. D. 198, 205.
(4) 14 Ch. D. 167.
(5) 23 Ch. D. 511, 520, 523.
(6) 27 Ch. D. 33.
(7) Law Rep. 3 Ch. 125.
(8) *Ante*, p. 333.

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Subsequent decisions of Mr. Justice *Pearson* are inconsistent with the decisions relied on by the Applicant: *Batten* v. *Wedgwood Coal and Iron Company* (1); *Smallpage's and Brandon's Cases* (2).

[VAUGHAN WILLIAMS J. referred to sect. 1, sub-sect. 2, of the *Preferential Payments in Bankruptcy Act*, 1888.]

The fact of there being a special enactment shews that it is an exception to the general practice.

The order of priority is pointed out by rule 31 of the Companies (Winding-up) Rules, 1890. First of all the fees must be paid, then the expenses of realization, and then, subject to the order of the Court, and *longo intervallo*, the liquidator's "necessary disbursements," which include costs such as these. When the Official Receiver is appointed liquidator, the amount of a portion of his fees depends on the amount distributed in dividends: Order as to Fees of the 17th of December, 1891, Table B. The amount payable to him could not be ascertained now if he were liquidator, but it would be clearly payable in priority to the Applicant's costs. [He also referred to *Kendall* v. *Hamilton* (3); *Dowse* v. *Gorton* (4); *Palmer's* Winding-up Forms (5).]

Younger, in reply:—

Ex parte Percival (6) cannot now be regarded as correctly stating the law.

[VAUGHAN WILLIAMS J.:—The portion of it which you attack was followed in *Ex parte Clitheroe* (7). *Ship's Case* (8) seems also to be in point.]

That case, like *Ex parte Percival*, falls after *In re Dominion of Canada Plumbago Company* (9), and in *Ship's Case* the order was different.

Rule 31 of 1890 does not alter the law. The words "subject to any order of the Court" preserve the elasticity of the old practice.

(1) 28 Ch. D. 317.
(2) 30 Ch. D. 598.
(3) 4 App. Cas. 504.
(4) [1891] A. C. 190.
(5) 2nd Ed. pp. 514, 515.
(6) Law Rep. 6 Eq. 519.
(7) 15 L. R. Ir. 47.
(8) 13 W. R. 1016.
(9) 27 Ch. D. 33.

[VAUGHAN WILLIAMS J. referred to *Bailey and Leetham's Case* (1).]

In re South Kensington Co-operative Stores (2) is also in the Applicant's favour.

VAUGHAN WILLIAMS J.:—

Before dealing with this particular application on its merits I will endeavour to state the principles on which the Court proceeds in these matters. Some rule of practice ought to be laid down, as the question frequently arises how the costs of a person successfully litigating with the liquidator of a company ought to be dealt with.

It was at one time contended that the terms of the *Companies Act*, 1862, were such that a successful litigant in proceedings with the liquidator, or with the company through its liquidators, or with the company after liquidation had begun, must come in and prove in respect of his claim *pari passu* with the creditors of the company who were such at the date of order for winding up. But that contention was disposed of by Vice-Chancellor *Malins* in *In re Home Investment Society* (3). I start, therefore, with the proposition that successful litigants, and other persons who become creditors of the company after the winding-up order, are *primâ facie* entitled to be paid in full, and I do not understand that is disputed by Mr. *Ashton Cross*. Thus two steps have been taken in the line of reasoning—(1.) that successful litigants are not to be placed in competition with the creditors who were such at the time of the winding up; and (2.) that *primâ facie* they have a right to be paid in full. Questions of priority may arise, but they will only be of importance where there is a deficiency in the assets, and not where everybody can be paid in full. Then out of what are the successful litigants to be paid? They are to be paid out of the assets of the company. That is the general rule, though under exceptional circumstances an order may be made going beyond that and giving them the right to be paid by the liquidator personally. The assets of the company are being administered by the Court; and thus one arrives at a

(1) Law Rep. 8 Eq. 94. (2) 17 Ch. D. 161.
(3) 14 Ch. D. 167.

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fund which will be applied according to the ordinary rules which govern the Court when dealing with a fund subject to its control. In this way questions of priority come to be decided. Lord *Cairns* in *Ex parte Smith* (1) (which Mr. *Ashton Cross* says has been misunderstood) decided at least this, that a successful litigant in proceedings commenced after the winding-up order has a right to be paid in priority to the general costs of the liquidation. To my mind that is laid down in the plainest possible manner by Lord *Cairns*, and subsequent cases recognise that he did so. The proposition that a successful litigant is entitled to be paid in priority to the general costs of the liquidation was affirmed in *In re Home Investment Society* (2), and also in *In re Dominion of Canada Plumbago Company* (3)—certainly by Mr. Justice *Pearson*, and as I read it by the Court of Appeal also. [His Lordship referred at considerable length to Mr. Justice *Pearson's* judgment, and continued:—]

I am only concerned here to shew that by a long and uninterrupted stream of authority a successful litigant has been held to be entitled to be paid his costs in priority to the general costs of the liquidation, and that being so I will not at the present moment consider what particular costs come before, or rank *pari passu* with his costs. Assuming for the moment that there are such costs, what are the rights of the successful litigant, and is he entitled to immediate payment? *Primâ facie*, he is. If the estate is solvent, in practice he obtains immediate payment, although that does not shew that he has a right to it. I cannot understand why he should not have the right to immediate payment. If the estate is insolvent, there must necessarily be an abatement; but until insolvency is shewn the right of the successful litigant is to be paid in full; although I recognise that the fact of the fund being in Court makes a difference, because the litigant has not to stretch his hand to seize what he is entitled to out of the assets of the company, and the Court must be satisfied as to his right before it allows him to be paid. That being his *primâ facie* right, the *onus* is on the liquidator to shew that the condition of the assets is such that the successful litigant is not

(1) Law Rep. 3 Ch. 125. (2) 14 Ch. D. 167.
(3) 27 Ch. D. 33.

entitled to what is *primâ facie* his right. It may be that the costs of the winding-up petition have not been paid—in which case the Court will postpone payment of his costs till those costs have been paid. But the *onus* is on the liquidator to shew that the convenient course of immediate payment should not be followed. If the liquidator shews that there are persons who have a prior right to, or who are entitled *pari passu* with, the successful litigant, the Court will not make any order in his favour without providing for their claims. In the present case I am told that there is some gentleman who has obtained an order for payment of costs which is prior in date to the order obtained by the Applicant. I quite agree that priority in the date of the order makes no difference. When once a person is in a position to say, "I am entitled to rank on this fund," that is to say, the assets available for the purposes of liquidation, he and all other persons in the same position must be dealt with on a footing of equality irrespective of the dates of their judgments. The obtaining of the order for costs creates no sort of a charge on the assets, but I cannot see that *Cape Breton Company* v. *Fenn* (1) decides more than that.

The late Master of the Rolls, Sir *George Jessel*, said in that case (2): "Upon that application an order was made that Mr. *Rooney's* costs should be paid to him out of the assets of the company. It is well known that such an order does not create a charge upon the assets; it limits the right of the person in whose favour it is made to payment out of the assets, but it does not create a charge upon them. If it did, the persons in whose favour such orders were made would have priority according to the dates of their orders; but that is not so. In many cases the liquidator has priority over all these orders even for subsequent costs. The order does not create a charge upon the assets, but gives a right to get paid out of the assets in a due course of administration, and nothing more, and this was a right given to the petitioner."

The remarks of Sir *George Jessel* in that case only shew that when there is an insolvent fund, and various claimants have obtained orders for costs entitling them to rank on that fund,

(1) 17 Ch. D. 198. (2) 17 Ch. D. 205.

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such persons obtain no charge on the fund, and the dates of the orders give no priority. The liquidator seeks to treat that case as a decision that a successful litigant who gets an order for costs is not entitled to payment until the liquidation has been completed, so that provision may be made for the whole costs of the liquidation, including contingent debts, and fresh debts incurred of the character of those to which priority is given under rule 31 of the Rules of 1890, or the general practice of the Chancery Division. I do not understand the case to decide anything of the kind, and I am not going to hold that the right to payment is postponed until all possible claims, contingent or otherwise, in the winding-up have come in. I hold that the order gives the successful litigant the *primâ facie* right to immediate payment in full; but if there are other persons who have existing claims prior in right or equal to his own, then he can only get payment subject to their priority or on an equality with them. I should like to say a word or two about *In re Dominion of Canada Plumbago Company* (1). It is said that Lord *Romilly* decided in *Ex parte Percival* (2) that the litigant was not entitled to immediate payment, and that no order for payment to him could be made while the liquidator's remuneration remained unpaid; and it seems to me that he did so decide. But I cannot agree that that decision was recognised as correct by the Court of Appeal in *In re Dominion of Canada Plumbago Company*. When that case was before Mr. Justice *Pearson* he said in terms that the litigant was entitled to be paid forthwith, and that means, of course, in conjunction with others in the same position, and subject to abatement in case of deficiency. But it is said that the Lords Justices went on a different principle and followed *Ex parte Percival*. It seems to me that they did nothing of the kind.

The order made in *In re Dominion of Canada Plumbago Company* was that the liquidator should pay *Kirby*, who was the litigant, the taxed costs of his litigation, and should be at liberty to retain the amount out of the assets of the company. In the course of the argument it was assumed that the effect of the decision in *In re Home Investment Society* (3) was, that a litigant who

(1) 27 Ch. D. 33. (2) Law Rep. 6 Eq. 519. (3) 14 Ch. D. 167.

had obtained an order for payment out of the assets was entitled to be paid subject to the priority or equality of existing claimants, and the argument was that that decision had no application in *In re Dominion of Canada Plumbago Company* (1), because in that case the order was not for payment of the costs out of the assets, but that the liquidator should pay them and retain them out of the assets; and it was contended that, whatever the priority of the successful litigant might be, and whatever right he might have to be paid before the costs of the liquidation were paid, that right did not exist in the case of a liquidator who, having been ordered to pay costs personally, must, *primâ facie*, have been in fault, and, therefore, could only come in *pari passu* with other persons having claims on the fund. The Court of Appeal decided that the liquidator had a right to recoup himself this amount at once, and to be treated as favourably as the successful litigant. The question was what fund was available for the costs of *Beall*, who at one time had been solicitor to the liquidator. If the liquidator was right in recouping himself the sum which at an earlier date he had paid to *Kirby*, a smaller amount remained for *Beall* and others than the sum to be taken by them if the liquidator was wrong in recouping himself. The effect of the judgment seems to have been that the liquidator had a right under the order to recoup himself. If that was not the meaning of the judgment, on what principle could it be said that the liquidator should be placed in a better position than that of a successful litigant? They are both persons who have to look to the assets for payment, and it was therefore contended that, as the intention was that the costs should come out of the assets, whether the order on the liquidator was for payment of the costs out of the assets, or that he should pay them himself and recoup himself out of the assets, both should be paid at the same time.

I cannot make out why a successful litigant should be in a worse position than the liquidator himself in reference to the right to come on the assets. In equity, where executors or trustees have a right to come on the estate for indemnity, those who have given credit to them have a right to stand in their shoes and come upon the estate. For that reason, also, I

(1) 27 Ch. D. 33.

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think that the decision of Mr. Justice *Pearson* in *In re Dominion of Canada Plumbago Company* (1) was correct.

It was contended before me that, in later cases, a different conclusion was arrived at, and I was referred especially to *Smallpage's and Brandon's Cases* (2); but the decision there was as to the circumstances under which a liquidator ought to be ordered personally to pay the costs of proceedings in which he has been unsuccessful, and has nothing whatever to do with the question raised in the present case.

If a trustee in bankruptcy is a litigant and is unsuccessful, he is made personally liable for costs; but it is not so with liquidators. In bankruptcy, cases sometimes arise of trustees declining to embark in litigation because they may be made personally responsible for costs—in which case the creditors often come forward and indemnify them. It is said that if liquidators were bound at once to pay the costs of successful litigants, winding-up would soon come to an end. But that is not so. If necessary, creditors in liquidations, as in bankruptcy, must provide an indemnity fund. If the result of the rule of practice I am laying down is that, where liquidators now start proceedings knowing there is no estate on which the adverse litigant can come, creditors should find that liquidators will not go on without an indemnity fund, so much the better. I am not to be deterred from laying down the rule because it is suggested that, where there is a doubt as to the sufficiency of the assets, liquidators will be deterred from commencing proceedings because those who have present claims may swallow up the assets.

Having laid down the rule which I think ought to prevail, I now propose to say a word or two about the practice as it now exists under rule 31 of the Companies (Winding-up) Rules, 1890. What I have said before relates to the practice before that time. As I understand the decisions to which I have referred, the result was that prior to 1890, if costs were ordered to be paid out of the assets to a successful litigant, such litigant was entitled to payment in full, and if the estate was insolvent or insufficient, then his right was to be paid in priority to the

(1) 27 Ch. D. 33. (2) 30 Ch. D. 598.

general costs of the liquidation, and also in priority to the remuneration of the liquidator. Practically, therefore, such costs came first after the costs of the petition to wind up the company. When those were once paid there was nothing else before those costs. A question sometimes arises with regard to the costs of the realization. Of course, no one would suppose that he could go against the gross assets; the net assets are all that he could go against, and the costs of a successful litigant would thus, if the costs of the realization be taken into account, come in the third place, not in the second. Subject to those costs, it seems to me that the position of a successful litigant was, as regards priority, before the Rules of 1890, in the second place. Then was there any limitation to his right of immediate execution? The answer to that question is, that if there were other claimants with an equal or a prior right to his, he could not have had execution without providing for their claims. Then came rule 31 of 1890. It is to be observed that the costs of a successful litigant are not mentioned there at all, nor in my opinion was it necessary to mention them. They are provided for by the words, "subject to any order of the Court." The question is what a litigant gets when his costs are ordered to be paid out of the assets of the company, and the whole of the rule as to priority is subject to that. So the costs of a successful litigant come in the same place as before the rules were made.

Then, as regards the present case, it has been brought to my attention that there are certain persons who have got orders which will rank in equality with that of the present claimant. It has also come to my notice that there are outstanding claims —there are said to be three—put forward by the liquidator, in respect of which he had to give security for costs. I suppose he did that out of the estate. I do not know how that is, and I decide nothing as to his right to do so. I am also told that there are other matters which may have to be gone into. There is in hand a sum of about £1000, which would be *primâ facie* sufficient to pay these costs; but I do not dispose of that matter now. What I propose to do is to order that this matter be referred back to Chambers, with liberty to the liquidator to bring to the attention of the Registrar any present claims, or present orders,

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or rights to immediate payment; and if it appears, after taking all that into consideration, that there is a sufficient sum to warrant the payment to this Applicant of his costs, then he may have them. If it appears that there is not a sufficient sum, then I cannot make any order for immediate payment. At the same time, I do not think that, even in such case, the present Applicant, who has got an order for payment, is to have his right of payment postponed while the whole of the assets may be wasting away in the sunshine of liquidation. I think that the Applicant and those who are in the same position as he is ought to have an opportunity of having some time fixed when the fund available should be distributed; so I order that, in case the Registrar comes to the conclusion that there is not a sufficient sum to allow payment of these costs, he should send the matter back to me with a certificate of what the sum is and what claims on it there are, and I will then see what can be done.

I might be thought wanting in respect for the Irish Court if I did not refer to *Ex parte Clitheroe* (1). The final words of the judgment in that case are as follows: "I do not, however, think that they are entitled to an order for immediate payment, as this might possibly interfere with the rights of other persons; and the cases of *Ex parte Percival* (2) and *In re Dimson's Estate Fireclay Company* (3) are authorities against making such an order." Those words seem to support the contention of the liquidator in the present case; but the Irish case is perhaps the only direct authority in his favour, unless *Ex parte Percival* is one. In *Ex parte Clitheroe*, however, the Court was dealing with a very different case from this. The company was being wound up under the supervision of the Court, and the landlords of property held by the company, without obtaining the leave of the Court, brought an action to recover possession, and obtained judgment. Under these circumstances it was held that they could not have an order for immediate payment of their taxed costs. The decision does not seem to me to accord with the current of authority in this country.

The costs of both the Applicant and the liquidator must be paid out of the assets.

(1) 15 L. R. Ir. 47, 51. (2) Law Rep. 6 Eq. 519. (3) Law Rep. 19 Eq. 202.

Cross:—Is the Registrar to have regard to the Board of Trade fees?

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If the position of things is that the Board of Trade can come and say, "Mr. Liquidator, pay us our fees now," the Registrar must take the fees into account; but if the position is that the Board of Trade will only be entitled to fees at a future time, then the fees must be disregarded.

Solicitors for Applicant: *Wynne, Holme & Wynne.*
Solicitors for liquidator: *G. R. Grant & Co.*

F. E.

In re THEATRICAL TRUST, LIMITED.

CHAPMAN'S CASE.

[00177 of 1893.]

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March 21, 22.

Company—Shares—Payment not in Cash—Illusory Consideration—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

If the consideration payable for shares issued by a company is illusory, or permits an obvious money measure to be made shewing that discount has been allowed, filing the contract under which the shares were issued with the Registrar of Joint Stock Companies will not relieve the allottee from the obligation to pay the nominal value of the shares, or the amount of the discount, in cash; but the Court is not bound to inquire in each case whether the price was reasonable, or whether what was given for the shares had a cash value in the market equal to the nominal value of the shares.

THE *Theatrical Trust, Limited*, was incorporated on the 22nd of December, 1891, under the *Companies Acts*, 1862 to 1890, one of its objects being to acquire the benefits of certain dramatic copyrights and agency contracts from *W. E. Chapman.*

Chapman, one *Brandon*, and two other persons were the first directors of the company.

On the 26th of July, 1892, *Chapman* entered into an agreement with *Brandon* to transfer to the latter 400 fully paid vendors' shares in the company, in consideration of *Brandon* acting as its solicitor.

On the 10th of August, 1892, a resolution was passed by a

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meeting of directors, composed of *Chapman*, *Brandon*, and another person, to enter into the agreement of that date to be next mentioned.

By an agreement in writing dated the 10th of August, 1892, and made between *Chapman* (thereinafter called "the vendor") of the one part, and the company of the other part, after reciting that the company was desirous of commencing business in conformity with its memorandum and articles of association, and was also "desirous of appointing . . . *Chapman* as the company's managing director at a salary to be agreed upon," it was witnessed that "in consideration of the foregoing and in consideration of the further work and trouble and expense" of *Chapman* in and about a scheme formulated by *Chapman* for the purpose of dealing with certain theatrical matters, and in further consideration of *Chapman* transferring to the company the benefit of all contracts in respect of agency and other business (if any) which he had either entered into or was in negotiation for, and in consideration also of *Chapman* paying all expenses in connection with the formation and registration of the company up to allotment, it was agreed (1.) that the amount to be paid to *Chapman*, or his assigns or nominees, in consideration of the premises, should be £4000, to be paid as to £100 in cash, as to £3200 in fully paid ordinary shares of the company of £1 each, and as to the remaining £700 in fully paid founders' shares of £10 each; (2.) that *Chapman* should serve the company for five years as its managing director at a salary to be agreed upon between him and the other directors.

On the 26th of August, 1892, the agreement last mentioned was filed with the Registrar of Joint Stock Companies, and the 3900 shares were afterwards allotted to *Chapman*, who was registered in the company's books as the holder of the shares, which were described as fully paid up. The certificates for the shares were issued on the 22nd of September, 1892.

On the 1st of September, 1892, *Chapman* transferred 400 of the shares to *Brandon*, and in October, 1892, *Chapman* transferred 200 of the shares to *Greville*. *Chapman* never assigned or handed over to the company any dramatic copyrights or agency contracts.

In June, 1893, the company resolved to wind up voluntarily, and the voluntary winding-up was continued under the supervision of the Court.

The liquidator placed the names of *Chapman*, *Brandon*, and *Greville* on the list of contributories, and the alleged contributories applied to have their names removed from the list.

W. E. Vernon, for *Chapman* and *Brandon*, and *P. Rose-Innes*, for *Greville*:—

The shares, though not paid for in cash, were issued as fully paid up for a valuable consideration, in pursuance of an agreement filed under sect. 25 of the *Companies Act*, 1867; and failure of consideration is not a ground for putting a shareholder on the list of contributories: *Mege and Angier's Case* (1). The transferees only agreed to take fully paid shares, and neither *Chapman* nor either of his transferees is liable as a contributory.

Manson, and *James Roberts*, for the liquidator:—

Sect. 25 of the *Companies Act*, 1867, only regulates the mode of payment, and contains no provision exempting shares from being paid up in full: *per* Lord Justice *Lindley*, *In re Addlestone Linoleum Company* (2). The section may qualify and cut down the form of payment, but there must be payment: *Ooregum Gold Mining Company of India* v. *Roper* (3). The filing of a contract with the Registrar of Joint Stock Companies does not relieve a shareholder from the obligation of paying for shares issued as a free gift or bonus, even when they have been honestly allotted in recognition of past services to the company: *In re Eddystone Marine Insurance Company* (4). No copyrights or agency contracts were ever handed over to the company, and the consideration for the shares was illusory. In such a case the filing of a contract does not relieve the shareholder from the obligation to pay for the shares in cash. Where the contract is that the person taking the shares is to give the company something which, admittedly, is not worth the amount of the shares, he will have to pay up the difference in a winding-up: *per* Lord

(1) W. N. (1875) 208.
(2) 37 Ch. D. 191, 205.
(3) [1892] A. C. 125, 134.
(4) [1893] 3 Ch. 9.

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CHAPMAN'S CASE.

Justice *Cotton, In re Almada and Tirito Company* (1). The Court may direct an inquiry as to the real value of what is given for the shares: *Pell's Case* (2). [They also referred to *In re London Celluloid Company* (3).]

Vernon and *Rose-Innes*, in reply.

[Other questions of law were argued and decided, but do not call for a report. The learned Judge held that the contract had in fact been filed before the shares were issued to *Chapman*, and then delivered judgment, as reported below, on the only question of which the argument has been reported.]

VAUGHAN WILLIAMS J.:—

The next question is whether the shares were issued to *Chapman* subject to payment, or without any intention that he should pay for them or be under any liability to pay for them.

It was contended that there was never any intention that they should be paid for, and the argument addressed to me on behalf of the liquidator is based on *In re Eddystone Marine Insurance Company* (4) and *In re Almada and Tirito Company*. The effect of these cases is that sect. 25 of the Act of 1867 only points out the mode in which payment for shares is to be made, and that if a person complies with that section, the result is that he may pay otherwise than in cash; but they do not decide that where an agreement is registered the shareholder is altogether relieved from payment. When one has to consider what is payment, it is plain that the moment the shareholder is relieved from the obligation of paying in cash, he may pay in goods, or in things without a physical existence, such as a goodwill or a licence. But the cases decide that a man must really pay for the shares, and further, that if the contract makes it manifest on its face that the taker of shares is paying less than their nominal cash value, he may be liable for the balance. I do not think the cases go further than that. They do not say that the Court can take each contract and say whether the price given was fair and reasonable, or whether the thing given for the shares had a cash value in

(1) 38 Ch. D. 415, 423.
(2) Law Rep. 8 Eq. 222; 5 Ch. 11.
(3) 39 Ch. D. 190.
(4) [1893] 3 Ch. 9.

the market equal to the nominal value of the shares. I do not think the Court is concerned with that question, or that it is bound to measure considerations in that way. There was no difficulty in *In re Eddystone Marine Insurance Company* (1), because no consideration was given; the shares were bonus shares. And there was no difficulty in *In re Almada and Tirito Company* (2), because there £1 shares were issued with a part fully paid up, namely, at a discount, and there was no consideration for the discount. But if the consideration is illusory, or if it permits an obvious money measure to be made shewing that discount was allowed, or if the shares are openly issued at a discount, the mere fact that the contract has been filed will not put the allottee in a position to relieve himself from the payment which the Act of 1862 requires to be made for the shares. In the present case, however, I am of opinion that the liquidator has not sustained the *onus*, which is on him, of shewing that the consideration was illusory. In paragraph 8 of his affidavit, filed the 8th of February, 1895, the liquidator says: "The consideration purporting to be assigned to the company by . . . *Chapman* under the said agreement of the 10th of August, 1892, and stated therein to consist of certain contracts and copyrights in plays, was never in fact assigned to the company by . . . *Chapman*, and was wholly illusory"; but he gives me no reason for supposing so. There are no materials enabling me to judge of the value of the property agreed to be handed over by *Chapman*, and the agreement shews that a premium was offered to *Chapman* to assume the office of managing director.

In my judgment, the liquidator has not brought the case within the authorities I have referred to, and the evidence does not shew that the consideration was illusory, or the shares were issued at a discount, or were in any sense a present to *Chapman*; and, under the circumstances, the contention of the liquidator fails.

Solicitors for *Chapman* and *Brandon*: *Brandon & Nicholson.*
Solicitors for *Greville*: *Greville & White.*
Solicitor for liquidator: *W. Negus.*

(1) [1893] 3 Ch. 9. (2) 38 Ch. D. 415.

F. E.

VAUGHAN WILLIAMS J.

1895

April 3.

MARWICK *v.* LORD THURLOW.

[1895 M. 134.]

Company—Debenture Action—Judgment—Declaration of Charge.

In a debenture-holders' action it is the general practice of the Chancery Division to allow the judgment to contain a declaration that the debenture-holders are entitled to a charge on the assets of the company purporting to be charged by the debentures, even where the action is heard as a short cause on motion for judgment and judgment is taken by consent (1).

THE *Colonial Debenture Corporation* issued debenture stock to the amount of about £10,000 under a trust deed dated the 4th of April, 1892, and made between the corporation, of the one part, and *Thomas John*, Baron *Thurlow* and the Honourable *Godfrey E. P. Willoughby* (trustees) of the other part.

By the trust deed the corporation charged, with payment of a sum corresponding in amount to the debenture stock, and of the interest thereon, all its property, present and future, including its uncalled capital for the time being, and the security became enforceable in certain events, one of which was the making of a winding-up order.

A winding-up order was made on the 20th of December, 1894, and on the 11th of January, 1895, an action was brought by *D. W. Marwick*, on behalf of himself and the other holders of the debentures, against the trustees and the corporation, claiming to have the security realized.

A statement of claim was delivered, but no defence was put in, and notice of motion was served by the Plaintiff for judgment for the relief claimed by the statement of claim, which asked, amongst other things, for a declaration that the debenture-holders were entitled to a charge upon the undertaking of the corporation and upon all its property, present and future, including its uncalled capital.

(1) Compare *Charlwood* v. *Leasehold Investment Company* (W. N. (1895) 47); *Brinsley* v. *Lynton and Lynmouth Hotel and Property Company* (W. N. (1895) 53); *Parkinson* v. *Wainwright and Company* (W. N. (1895) 63).

No liquidator had been appointed, and the Official Receiver of the company was therefore *ex officio* provisional liquidator.

Minutes of the judgment proposed to be taken, including a declaration of charge as claimed by the statement of claim, were prepared and submitted to the trustees and the Official Receiver for their approval, and the action was set down as a short cause.

The solicitors of each trustee, and the Official Receiver, wrote letters stating that they did not see any objection to the proposed minutes, and did not intend to appear on the motion.

A. à Beckett Terrell, for the Plaintiff, moved for judgment in the terms of the minutes submitted to the trustees and the Official Receiver.

VAUGHAN WILLIAMS J.:—

Some time since Mr. Justice *Romer* declined to make such a declaration as is now asked for, on the ground that there ought first to be an inquiry as to the validity of the debentures. There being a doubt, however, I have consulted the Judges of the Chancery Division, and they, including Mr. Justice *Romer*, think that, however advantageous the omission of the declaration may be, it is not in accordance with the practice. I feel bound to follow the practice so laid down; but I do not feel bound to make the declaration in the present case in the absence of the Official Receiver, and I do not wish to have my hands tied too tightly by the practice. I do not like it much, and for this reason: Debenture-holders' actions commenced before a winding-up order has been made are often transferred to me after judgment has been given. One of the matters to be inquired into in the winding-up is frequently the validity of the debentures. While the company is solvent and a going concern those who have the direction and management of it do not always take the same view of the validity of alleged charges as that which I might take, especially where the directors are the nominees of the vendors. And after a winding-up order the liquidator does not invariably take the same view as that previously taken by the directors. But when an inquiry as to the validity of the debentures is suggested, the Court is frequently hampered by

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the existence of a declaration, perhaps made in a short cause, which, it is said, establishes beyond hope of recall the validity, though of course not the priority, of the debentures. I have often felt that it would be to the interest of everybody that inquiry should not be burked in this way. In the present case the difficulty does not arise, because the action was not commenced before the winding-up order was made; but I do not think the case is one in which the declaration ought to be made without due consideration. So much do I regard a company insolvent and in winding-up, and therefore *plus* its creditors, as a different entity from a going company not in liquidation, that after a winding-up order I shall not make the declaration asked for without the assent of the Official Receiver and Liquidator being placed on record. The Official Receiver must attend in Court. Expense may be incurred by his so doing, but I will take care that it shall be so small as to be unworthy of consideration.

Later in the day one of the Assistant Official Receivers attended, and explained matters to his Lordship.

VAUGHAN WILLIAMS J.:—

I am informed that it was doubted whether the debentures could be disputed, having regard to the fact that the petition was presented by a debenture-holder. I do not think myself that that fact is material, and under the circumstances I shall not at present make a declaration of charge; but I will order the trusts of the deed to be carried into execution, and direct the inquiries asked for to be taken.

Solicitor for the Plaintiff: *G. M. Folkard.*

F. E.

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CHARITY — *Administration — Announcement of Scholarship—Contract or Invitation—Refusal to elect—Action by Candidate—Consent of Charity Commissioners — Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 17.] A trust deed provided that a scholarship should be awarded to the pupil leaving the M. School and going to University College, London, who should pass the best examination in subjects to be determined upon from time to time by the duly appointed examiners for the scholarship; the trustees announced an examination for June, 1894, which was held by a duly appointed examiner, and in which the Plaintiff obtained the highest number of marks. The announcement of the examination contained no offer or statement that the scholarship would be awarded to the pupil who passed the best examination. The trustees having declined to award the scholarship to the Plaintiff, this action was commenced against them claiming a declaration that the Plaintiff was entitled to the possession and enjoyment of the scholarship, and an order directing the Defendants to put the Plaintiff in possession:—*Held*, that the trusts of the deed could not be imported into the announcement of the examination; that there was nothing in the nature of a contract between the Plaintiff and the trustees, and that, as the Plaintiff's alleged individual equitable right involved the partial execution or administration of the charitable trusts, the certificate of the Charity Commissioners was necessary before the action could be proceeded with.—*Rendall* v. *Blair* (45 Ch. D. 139) discussed and explained. ROOKE *v.* DAWSON [480

2. —— *Endowment — Trustees' Discretionary Power of dealing with Capital—Mixed Charity—Charity Commissioners — Jurisdiction — Accounts —Contempt—Attachment, Motion for—Form of Order — Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *ss.* 62, 66.] A testator bequeathed his residuary personal estate to trustees upon trust to apply the same in such manner as they should "in their absolute and uncontrolled discretion think proper" for the benefit of a charity, which was not supported by any voluntary subscriptions:—*Held*, that, notwithstanding this absolute discretionary power of dealing with the trust funds, the bequest was an "endowment" of the charity within sect. 66 of the Charitable Trusts Act, 1853, and that the charity, not being a "mixed charity," was not exempted by sect. 62 from the jurisdiction of the Charity Commissioners, who were therefore entitled to demand

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from the trustees accounts of the property and income of the charity.—*In re Clergy Orphan Corporation* ([1894] 3 Ch. 145) considered. *In re* GILCHRIST EDUCATIONAL TRUST - - 367

3. —— *Gift by Will — Charitable Intention—Failure of Particular Object in Testator's Lifetime—Lapse—Cy-près.*] A testator bequeathed a legacy of £5000 "to the rector for the time being of St. Thomas' Seminary for the education of priests in the diocese of Westminster for the purposes of such seminary." At the date of the will St. Thomas' Seminary was carried on at Hammersmith; but shortly before the testator's death the seminary ceased to exist, and the students who were being educated there were removed to another seminary near Birmingham.—*Held* (affirming the decision of Chitty J.), that the bequest was for the benefit of the particular institution, and, that institution having ceased to exist in the testator's lifetime, the legacy could not be applied cy-près, but lapsed and fell into the residue.—*Clark* v. *Taylor* (1 Drew. 642) and *Fisk* v. *Attorney-General* (Law Rep. 4 Eq. 521) followed. *In re* RYMER. RYMER *v.* STANFIELD [C. A. 19

4. —— *Gift by Will—Mortmain—Reversionary Interest in Land—Mortmain and Charitable Uses Act*, 1888 (51 & 52 *Vict. c.* 42), *s.* 4—*Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *ss.* 3, 5.] A testatrix, who died in 1892, devised her reversionary real estate to certain persons for life with remainder to a charity:—*Held* (affirming the decision of Stirling J.), that the gift of the reversionary interest to a charity was valid.—Sect. 4 of the Mortmain and Charitable Uses Act, 1888, so far as it applies to wills, is inconsistent with and repealed by sect. 5 of the Mortmain and Charitable Uses Act, 1891, but remains in force so far as it is applicable to deeds. *In re* HUME. FORBES *v.* HUME C. A. 422

—— Friendly society — Objects of society exhausted—Cy-près - - - 489
See FRIENDLY SOCIETY.

CHARITY COMMISSIONERS—Jurisdiction of
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CLASS—Trust for—Period of ascertaining - 91
See SETTLEMENT. 2.

COLLIERY — Mortgage of — Receiver and manager - - - - 629
See MORTGAGE. 1.

COMMISSIONERS—Railway—Jurisdiction 128
See RAILWAY.

COMPANY—*Debenture*—"*Floating Security*"—*Execution Creditor—Intervention by Debentureholders after Sale but before Money handed over.*] Where the goods of a company are taken in execution and sold, but the money is not handed over to the execution creditor, the holder of a debenture constituting a charge by way of floating security upon all the property of the company may still intervene so as to oust the execution creditor.—Dicta of Lindley L.J. in *In re Opera, Limited* ([1891] 3 Ch. 260), considered and applied.—Notice of an injunction restraining a sale of a company's goods by the sheriff was not

COMPANY—*continued.*

given until after the sale had commenced. Before the sale was actually effected the solicitor of debenture-holders, who were Plaintiffs in a pending action for the enforcement of their security, which comprised the goods, paid the amount claimed to the sheriff's officer under protest and with notice to him not to part with the money:—*Held*, that the intervention of the debenture-holders was effectual, and the money belonged to them. TAUNTON *v.* SHERIFF OF WARWICKSHIRE - - - - 734

2. —— *Debenture Action—Judgment—Declaration of Charge.*] In a debenture-holders' action it is the general practice of the Chancery Division to allow the judgment to contain a declaration that the debenture-holders are entitled to a charge on the assets of the company purporting to be charged by the debentures, even where the action is heard as a short cause on motion for judgment and judgment is taken by consent. (Compare *Charlwood* v. *Leasehold Investment Company* (W. N. (1895) 47); *Brinsley* v. *Lynton and Lynmouth Hotel and Property Company* (W. N. (1895) 53); *Parkinson* v. *Wainwright and Company* (W. N. (1895) 63.) MARWICK *v.* LORD THURLOW - - - - - 776

3. —— *Reduction of Capital—Extinguishment of Shares—Confirmation by the Court—Classes of Shareholders—Duties of Directors as to Repairs—Companies Acts*, 1867 (30 & 31 *Vict. c.* 131), *s.* 9; *and* 1877 (40 & 41 *Vict. c.* 26), *s.* 3.] Under the Companies Acts, 1867 and 1877, the Court has jurisdiction to sanction a special resolution for the reduction of capital no longer represented by available assets cancelling the whole of two out of three classes of shares.—Where there has been a loss of capital and there are first preference, second preferenee, and ordinary shares, the loss should be made to fall upon that class of shares which according to the constitution of the company is the proper class to bear it.—Duties of directors as to maintaining and repairing the company's property stated. *In re* FLOATING DOCK COMPANY OF ST. THOMAS, LIMITED 691

4. —— *Shares — Director — Qualification — Agreement to become Member—Winding-up—Contributory—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 23.] Where the articles of association of a company require that the directors shall hold a certain qualification in shares, merely accepting office as a director and acting as such do not constitute an agreement to become a member of the company within sect. 23 of the Companies Act, 1862, but only a contract to qualify by taking the required shares within the time specified by the articles, or, if no time is named, within a reasonable time.—The lapse of the time within which the director is bound to qualify only amounts to an offer to take shares, and no agreement to take them exists until the offer has been accepted, e.g., by placing the director on the register of shareholders, by resolving to allot the shares to him, or by his so acting as to shew that he has assumed that his offer has been accepted, and by both parties acting on that assumption. Mere lapse of time will not turn the offer into a contract; and there

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is no contract unless the offer is accepted before the company goes into liquidation. *In re* ISSUE COMPANY. HUTCHINSON'S CASE - - 226

5. —— *Shares—Contract—Alternative Stipulations—Covenant to pay £1000 or to transfer £1000 worth of Shares in Company to be formed by Covenantor—Company formed with Shares of different Classes—Breach of one Alternative—Right of Covenantee to enforce the other—Shares of no marketable value.*] The Defendant covenanted by deed within twelve months to pay the sum of £1000, or transfer to the Plaintiff £1000 worth of fully-paid shares, in a company to be formed by the Defendant. The Defendant formed the company with preference and ordinary shares, and, within the period named, transferred to the Plaintiff shares of the latter class of the nominal value of £1000, and purporting to be fully paid; but no contract in respect of them had been registered previous to their issue, nor were they in fact fully paid up in cash, and the Plaintiff refused to accept them. After the expiration of the twelve months a contract in respect of the shares was filed with the Registrar of Joint Stock Companies. The shares of the company were of no value, and had never been marketable.—In an action to recover the sum of £1000:—*Held*, by Stirling J. that the Plaintiff was not bound to accept shares in a company in which all the shareholders did not stand on a footing of equality, and that, as the Defendant had by so forming the company put it out of his power to comply with that branch of the covenant which related to the shares, he must perform the alternative and pay the £1000.—*Studholme* v. *Mandell* (1 Ld. Raym. 279) followed.—*Held*, by the Court of Appeal, that "£1000 worth of shares" meant shares of that value in the market: and the shares transferred being of no marketable value, the judgment of Stirling J. was affirmed on that ground. MCILQUHAM *v.* TAYLOR - C. A. 53

6. —— *Shares—Payment not in Cash—Illusory Consideration—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] If the consideration payable for shares issued by a company is illusory, or permits an obvious money measure to be made shewing that discount has been allowed, filing the contract under which the shares were issued with the Registrar of Joint Stock Companies will not relieve the allottee from the obligation to pay the nominal value of the shares, or the amount of the discount, in cash; but the Court is not bound to inquire in each case whether the price was reasonable, or whether what was given for the shares had a cash value in the market equal to the nominal value of the shares. *In re* THEATRICAL TRUST, LIMITED. CHAPMAN'S CASE [771

7. —— *Winding-up — Costs — Liquidator's Liability for Costs of Successful Litigant.*] An application by certain persons to be struck off the list of contributories of a company in liquidation was opposed by the liquidator and was refused with costs; but an appeal from such refusal was allowed with costs above and below:—*Held*, that the applicants were entitled to costs only out of the assets of the company, and not against the liquidator personally.—*In re Staffordshire Gas*

COMPANY—*continued.*

and Coke Company ([1893] 3 Ch. 523) overruled. *In re* R. Bolton and Company. Salisbury-Jones and Dale's Case - - C. A. 333

8. —— *Winding-up — Costs of Successful Litigant—Priority—Right to Immediate Payment —Companies (Winding-up) Rules*, 1890, *r.* 31.] Rule 31 of the Companies (Winding-up) Rules, 1890, does not affect the priority which under the old practice attached to costs ordered to be paid by the liquidator out of the assets of the company to a successful litigant, and the costs directed to be paid by an order in that form are primâ facie payable immediately and in full out of the net assets of the company.—The onus is on the liquidator to shew that the condition of the assets is such that immediate payment cannot be made; and if he shews that other persons have a prior right to, or are entitled pari passu with the successful litigant, no order for payment will be made without providing for the other claims.—The date of the order gives no priority, but payment will not be indefinitely postponed until all claims have come in.—*In re Home Investment Society* (14 Ch. D. 167) and *In re Dominion of Canada Plumbago Company* (27 Ch. D. 33) followed.—*Ex parte Percival* (Law Rep. 6 Eq. 519), *In re Dronfield Silkstone Coal Company* (No. 2) (23 Ch. D. 511), and *Ex parte Clitheroe* (15 L. R. Ir. 47), not followed. *In re* London Metallurgical Company - - - 758

9. —— *Winding-up — Director — Misfeasance —Misapplication of Assets of Company—Private Company — Presents to Directors — Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.] Directors cannot pay themselves for their services, or make presents to themselves out of the company's assets, unless authorized so to do by the instrument which regulates the company, or by the shareholders at a properly convened meeting.—N., the chairman of a company in which substantially all the shares were held by himself and his family, purchased on behalf of the company the right to a building agreement to be obtained from certain commissioners. The commissioners objected to the company as tenant, and proposed to substitute N., who thereupon sold the benefit of the agreement to the company at an advance of £10,000, of which £7000 was spent upon commissions and otherwise in order to obtain the agreement from the commissioners, and £3000 was applied by N. to his own use. A further sum of £3500 was spent by N. out of the assets of the company upon his private house. These payments were made out of money borrowed by the company for the purpose of its business; they were sanctioned by resolutions of the directors, and were approved of by all the shareholders. The articles contained no power to make presents to directors.—Upon a summons taken out by the liquidator in the winding-up of the company against N. under sect. 10 of the Companies (Winding-up) Act, 1890 :—*Held*, that N. was not liable for the £7000, but was liable for the 3000*l.* and the £3500, first, because the shareholders for the time being had no power to authorize the making of presents to directors out of money borrowed by the company; secondly, because if there had been such power it could

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be exercised only at a general meeting. *In re* George Newman & Co. - - C. A. 674

10. —— *Winding-up—Public Examination— Further Report of Official Receiver—Allegation as to Fraud—Statement based on Information and Belief—Statement of Opinion—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 8, *sub-ss.* 2, 3.] *Held*, by Vaughan Williams J. that sub-sect. 2 of sect. 8 of the Companies (Winding-up) Act, 1890, when it speaks of the further report of the Official Receiver stating whether in his opinion any fraud has been committed, cannot mean more than that the Official Receiver shall state that, on the information before him, uncontradicted and unexplained, he is of opinion that a primâ facie case is made of fraud having been committed by some person—not defining which person—falling within the description of persons mentioned in the sub-section, and that he believes such information to be true.—Whether such an expression of opinion is or is not a condition precedent to obtaining an order for public examination, it is a convenient practice which the Court will in general require to be followed before it makes such an order.—*Held*, by the Court of Appeal, that the Court has no jurisdiction under sect. 8 to direct a public examination, unless the Official Receiver either states expressly in his further report that in his opinion some fraud such as is mentioned in sect. 8, sub-sect. 2, has been committed, or the facts which are stated in the report shew clearly that in his opinion such a fraud has been committed.—If the report merely suggests or gives rise to a suspicion of fraud, this is not enough to give the Court jurisdiction to direct a public examination.—*In re Trust and Investment Corporation of South Africa* ([1892] 3 Ch. 332), *In re Laxon & Co.* ([1893] 1 Ch. 210), and *In re Birkdale Steam Laundry and Carpet Beating Company* ([1893] 2 Q. B. 386) discussed. *In re* General Phosphate Corporation. *In re* Northern Transvaal Gold Mining Company. *In re* Delhi Steamship Company - C. A. 3

11. —— *Winding-up—Public Examination— Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 8.] Where the Court has jurisdiction to make, and has exercised its discretion by making, an order for public examination under sect. 8 of the Companies (Winding-up) Act, 1890, the order will not be discharged on the ground that fraud is not sufficiently shewn by the Official Receiver's report on which the order is based.—And where the report is made in good faith, the Court will not allow evidence to be adduced to rebut the charge of fraud thereby made; and will not take the report off the file, or remit it to the Official Receiver in order that other facts, on which the person ordered to be examined relies, may be stated in the report. *In re* New Travellers' Chambers, Limited - - - - 395

12. —— *Winding-up—Order of the Court— Petition—Debt due under Agreement with Voluntary Liquidator—Sale of Assets by Liquidator— Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 95, 133 (*sub-s.* 7), 145, 161.] A debt due from a company under an agreement between it and its voluntary liquidators and another person is sufficient to support a petition by that person for

COMPANY—*continued.*

winding up the company by the Court.—Special resolutions were passed by the S. Company for voluntary winding-up, and appointing liquidators, who were thereby authorized to enter into an agreement with the U. Company for the transfer to them of the S. Company's assets and liabilities. By the agreement subsequently entered into the U. Company were to pay the debts of the S. Company; the amount paid, so far as it was not covered by the proceeds of realizing the assets, was to be treated as a debt due by the S. Company to the U. Company; and the liquidators were to make such calls on the shareholders of the S. Company as should be necessary to make up the deficiency:—*Held*, by Vaughan Williams J., and by the Court of Appeal, that sects. 95 and 133 of the Companies Act, 1862, empowered the liquidators to enter into the agreement.—*In re Bank of South Australia* ([1894] 3 Ch. 722) doubted. *In re* BANK OF SOUTH AUSTRALIA (2) - - - - **C. A. 578**

13. —— *Winding-up—Payment of Rates—Liquidator's Possession—Beneficial Occupation—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 138, 163.] The true test to be applied, in order to ascertain whether rates ought to be paid in full in respect of property of a company, possession of which has been retained by the liquidator, is that suggested by Bowen L.J. in *In re National Arms and Ammunition Company* (28 Ch. D. 474, 482): —whether there has been a "beneficial occupation" within the meaning of the rating statutes. —Therefore, where a caretaker is employed by the liquidator to take possession of the company's business premises and the plant thereon to prevent trespass and injury, though the business is not carried on and there is no intention to sell it as a going concern, there is a "beneficial occupation" in respect of which rates must be paid in full.—The test laid down by Bacon V.C. in *In re West Hartlepool Iron Company* (34 L. T. (N.S.) 568) and that laid down by Kay J. in *In re Watson, Kipling & Co.* (23 Ch. D. 500) (so far as it applies to rates) not adopted. *In re* BLAZER FIRE LIGHTER, LIMITED - - - - **402**

14. —— *Winding-up—Payment of Debts—Bankruptcy—Proof by Lessor—Judicature Act*, 1875 (38 *&* 39 *Vict. c.* 77), *s.* 10.] The rule laid down in *Hardy* v. *Fothergill* (13 App. Cas. 351) does not apply where a lessor is proving in respect of the liability of his lessee under a subsisting lease, whether the lessee is an insolvent company which is being wound up, or is a bankrupt; and in the case of an insolvent company in liquidation *In re Haytor Granite Company* (Law Rep. 1 Ch. 77) and *Horsey's Claim* (Law Rep. 5 Eq. 561) are still applicable.—And where such a company was the lessee of land for a term of fourteen years, with a power to determine the lease at the end of seven years on paying the rent and performing the covenants up to the date of the term being so determined, and the winding-up took place before the end of seven years, it was *held* that the lessor was entitled to claim in respect of the liability of the company as if the lease had been for fourteen years certain.—*Ex parte Blake* (11 Ch. D. 572) distinguished. *In re* NEW ORIENTAL BANK CORPORATION (NO. 2) **753**

COMPANY—*continued.*

15. —— *Winding-up—Payment of Debts—Voluntary Winding-up—Landlord and Tenant—Distress for Rent accrued after Winding-up Resolution—Agreement to pay Rent "in Advance"—Apportionment—Beneficial Occupation—Expenses of Winding-up—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 85, 87, 138, 163.] Under an agreement in 1892 the Defendants let to the Plaintiffs, a limited company, a shop for three years at a yearly rent payable quarterly, "two quarters' rent to be always due and payable in advance if required." On the 20th of December, 1894, the company went into voluntary liquidation, but the liquidator continued to occupy the shop for the purposes of the winding-up. The quarter's rent due on the 25th of December not being paid, the Defendants, on the 28th, demanded payment thereof, and also of the next two quarters' rent in advance, and, on payment being refused, proceeded to distrain.—Upon motion by the company for an injunction:—*Held*, that the rent for the December quarter must be apportioned, and that the Defendants had only the right to prove in the winding-up for the rent accruing up to the 20th of December, when the winding-up commenced, but were entitled to be paid in full for the rest of the December quarter, and also for so much of the next two quarters as the liquidator should continue in beneficial occupation, rent during such occupation being payable by him as expenses in the winding-up: *In re Lancashire Cotton Spinning Company* (35 Ch. D. 656); but that for the balance of rent for those two quarters the Defendants could only prove in the winding-up. SHACKELL & Co. *v.* CHORLTON & SONS - - - - - - **378**

16. —— *Winding-up—Rights of Contributories inter se—Shares issued at a Discount—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 38—*Companies Act*, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 25.] The articles of association of a limited company empowered the directors to allot shares at a discount, and provided that, if the company should be wound up, and the surplus assets should be insufficient to repay the whole of the paid-up capital, such surplus assets should be distributed so that, as nearly as might be, the losses should be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them respectively at the commencement of the winding-up: "But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions." In the winding-up of the company, the debts and the costs of winding up having been paid:—*Held*, that notwithstanding the above clause, the decisions in *In re Almada and Tirito Company* (38 Ch. D. 415) and *In re Weymouth and Channel Islands Steam Packet Company* ([1891] 1 Ch. 66) applied, and the holders of shares issued at a discount must, for the purpose of adjusting the rights of the contributories inter se, pay up their shares in full.—*Ooregum Gold Mining Company of India* v. *Roper* ([1892] A. C. 125) commented on. *In re* RAILWAY TIME TABLES PUBLISHING COMPANY. *Ex parte* WELTON **[C. A. 255**

17. —— *Winding-up—Scheme of Arrangement —Transfer of Assets and Liabilities to New Com-*

COMPANY—*continued.*

pany—Proof of Debt—Contingent Liability—Indemnity against Liability under Lease—Joint Stock Companies Arrangement Act, 1870 (33 & 34 *Vict. c.* 104), *s.* 2.] The lessee of certain mines assigned his leases to a company which covenanted to indemnify him against liability thereunder. The company went into liquidation, and a scheme of arrangement under the Joint Stock Companies Arrangement Act, 1870, was adopted and approved by the Court for forming a new company which should take over the assets and liabilities of the old company, and should pay or satisfy the unsecured creditors of the old company within three months of the approval of the scheme by the Court. After the new company was incorporated the lessee applied in the liquidation to have a sum provided to meet his contingent liability for rents, royalties, and breaches of covenant:—*Held* (affirming the decision of Wright J.), that the Joint Stock Companies Arrangement Act, 1870, applied to every person having a pecuniary claim against a company, whether actual or contingent, that the lessee was bound by the scheme, and that the application failed.—*Per* Wright J.: *Semble*, the lessee could compel the new company to indemnify him from time to time as he should be called upon to pay under the leases.—*Per* the Court of Appeal: Whether, having regard to *Hardy* v. *Fothergill* (13 App. Cas. 351), the lessee would have been entitled, apart from the scheme, to have assets of the old company impounded to meet his contingent liability under the leases, *quære*. *In re* Midland Coal, Coke, and Iron Company. Craig's Claim - - - - **C. A. 267**

18. —— *Winding-up—Unregistered Company—"More than Seven Members"—Jurisdiction—Res judicata—Purchase from Liquidator—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 199.] An unregistered company cannot be wound up under the 199th section of the Companies Act, 1862, unless there are more than seven existing members at the date of the winding-up petition. Representatives of deceased members, trustees of bankrupt members, and past members, although liable to contribute to the debts of the company, are not members within the meaning of the section.—A winding-up order is not a judgment in rem, and, if made improperly, is not binding on strangers.—*In re Padstow Total Loss and Collision Assurance Association* (20 Ch. D. 137) distinguished. *In re* Bowling and Welby's Contract - - - - - **C. A. 663**

—— Mortgage by—Deed irregularly executed—Validity—Quorum of directors - **621**
See Mortgage. 1.

CONDITION—Restraint of marriage - **449**
See Will. 1.

CONDITIONS OF SALE - - **190, 596**
See Vendor and Purchaser. 1, 2.

CONFLICT OF LAWS—*Administration—Land situate in Foreign Country—Trusts invalid under Foreign Law—Valid Trust for Sale—Application of Proceeds of Sale—Election.*] An English testator, who owned some land in Sardinia, by his will gave all his real and personal estate to trustees upon trust for sale and conversion, and to hold the same until conversion and the proceeds of sale after conversion, upon certain trusts (inter alia) for his children for their respective lives, with remainders to their respective issue. These trusts were (as the Court held on the evidence) to a great extent invalid under Italian law as regarded land in Italy, the result being that the tenants for life took their shares absolutely. Part of the land in Sardinia had been sold by the trustees:—*Held*, that, whether the trustees or the children took the land as "heirs" according to the Italian law, the trustees had power under that law, and that it was their duty to sell the land, and that the proceeds of sale must be held by them upon the trusts declared by the will:—*Held*, also, that the rents of the unsold land until sale would devolve according to Italian law, but that it was competent to and legal for the children to elect that those rents should be applied as if they had been income resulting from the proceeds of sale. *In re* Piercy. Whitwham *v.* Piercy - - - - - **83**

CONSOLIDATION OF MORTGAGES - **51**
See Mortgage. 2.

CONTINGENT LIABILITY—Proof of—Winding-up - - - - - **267**
See Company. 17.

CONTRACT—Announcement of competition **480**
See Charity. 1.

—— Rescission—Wilful delay—Mala fides **385**
See Vendor and Purchaser. 3.

CONTRIBUTORY—Adjustment of rights inter se **[255**
See Company. 16.

CONVERSION—Will—Option of purchase **724**
See Will. 4.

COPY—Entries in partnership books—Rights of partner - - - - **462**
See Partnership. 2.

COPYHOLD—Title—Devise to trustees—Legal estate - - - - **716**
See Will. 5.

COPYRIGHT—*Dramatic Work—Right of Representation—English Proprietor—Foreign Country—Infringement—Injunction—Jurisdiction—Dramatic Copyright Act*, 1833 (3 & 4 *Will.* 4, *c.* 15), *s.* 1—*Berne Convention, arts.* 2, 9.] An English Court has no jurisdiction, at the instance of the English proprietor of the performing right of a musical dramatic work of an English author, to restrain a threatened infringement by a British subject in any foreign country comprised in the International Copyright Union.—Under the Dramatic Copyright Act, 1833, s. 1, and article 2 of the Berne Convention, the English proprietor enjoys in any country of the Union the rights which the law of that country gives to natives of that country; and, therefore, proceedings by him to restrain an infringement in that country by a British subject must be taken in the Courts and according to the law of that country. "Morocco Bound" Syndicate, Limited *v.* Harris - **534**

2. —— *Sale of Blocks for Personal Use—Unassignable Licence—Effect of Verbal Licence—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *s.* 15—*Injunction—Substantial Injury.*] The Plaintiffs were the registered owners of the copyright in books containing illustrations, drawn by them-

COPYRIGHT—*continued.*
selves, of carriages; and their principal business was to supply copies of the drawings to persons in the carriage trade for advertising purposes, the copies being generally printed by themselves and supplied to the customers on advertising sheets.—Occasionally the Plaintiffs, for a money consideration, supplied electro blocks of the drawings in order that customers might themselves print the designs with other matter not printed by the Plaintiffs; and for this purpose they sold electro blocks to L. There was not any written agreement with or licence to L. with reference to the use of the blocks.—The Defendants, with the permission of L., used his blocks for printing drawings which they published:—*Held*, that the Plaintiffs were entitled to an injunction to restrain the Defendants from using the blocks.—*Semble*, that the Court would not have granted an injunction to restrain L. from personally using the blocks, although he had no written licence to do so under sect. 15 of the Copyright Act, 1842. COOPER *v.* STEPHENS - - - - 567

COSTS—Solicitor's lien—Property recovered 730
See SOLICITOR. 3.

—— Taxation—Solicitors' Remuneration Act
See SOLICITOR. 1, 2. [73, 524

—— Trustees—Items barred by Statute of Limitations - - - - 202
See PRACTICE. 5.

—— Winding-up—Liquidation—Successful litigant - - - - 333, 758
See COMPANY. 7, 8.

COUNTER-CLAIM—Action of review - 596
See VENDOR AND PURCHASER. 2.

COVENANT—*Quasi-separation Deed—Construction—Concubinage—Re-cohabitation.*] A quasi-separation deed was executed between a man and a woman, who had been living in concubinage, by which they mutually covenanted that they would in future live separately, and he covenanted to pay her an annuity during her life:—*Held*, that the obligation to pay the annuity did not cease by implication upon the parties subsequently resuming cohabitation. *In re* ABDY. RABBETH *v.* DONALDSON C. A. 455

—— To pay money or transfer shares—£1000 worth of shares. - - - 53
See COMPANY. 5.

—— To settle after-acquired property - 109
See SETTLEMENT. 1.

CY-PRÈS—Friendly society—Objects exhausted
See FRIENDLY SOCIETY. [489

—— Gift to charity—Failure of particular object
See CHARITY. 3. [19

DAMAGES—In lieu of injunction - - 287
See NUISANCE.

DEBENTURE—Action — Form of judgment — Declaration of charge - - 776
See COMPANY. 2.

—— Execution creditor—Intervention by debenture-holders - - - 734
See COMPANY. 1.

DIRECTOR—Misfeasance—Presents to directors
See COMPANY. 9. [674

—— Qualification - - - - 226
See COMPANY. 4.

—— Quorum of directors—Invalidity of acts
See MORTGAGE. 1. [629

DISPOSSESSION—Statute of Limitations - 641
See LIMITATIONS, STATUTE OF. 1.

DISSOLUTION—Building society - - 121
See BUILDING SOCIETY.

DISTRESS—Company—After commencement of winding-up - - - - 378
See COMPANY. 15.

DITCH—Property in—Boundary hedge—Presumption - - - - 641
See LIMITATIONS, STATUTE OF. 1.

DRAMA—Copyright in - - - 534
See COPYRIGHT. 1.

ECCLESIASTICAL COMMISSIONERS - 552
See ECCLESIASTICAL LAW. 1.

ECCLESIASTICAL LAW—*Lease of Mines in Glebe Lands—Ecclesiastical Commissioners — Right to Injunction against Illegal Mining*—13 *Eliz. c.* 10; 13 *Eliz. c.* 20; 14 *Eliz. c.* 11; 14 *Eliz. c.* 14; 5 & 6 *Vict. c.* 108, *ss.* 6, 20; 21 & 22 *Vict. c.* 57, *ss.* 1, 2, 10.] After the passing of the restraining statutes of Elizabeth, the opening of mines in glebe lands, and the letting of the mines by the incumbent, even with the consent of the patron and ordinary, were illegal until the passing of 5 & 6 Vict. c. 108, which enabled the mines to be leased with the consent of the Ecclesiastical Commissioners. The head-note of *Duke of Marlborough* v. *St. John* (5 De G. & Sm. 174) corrected. An incumbent cannot lawfully continue, or authorize a tenant, to work mines in glebe land which have been unlawfully opened. *Huntley* v. *Russell* (13 Q. B. 572) and *Bartlett* v. *Phillips* (4 De G. & J. 414) followed on this point. The Ecclesiastical Commissioners can maintain an action to restrain the working of mines in glebe lands otherwise than under a lease sanctioned by them. Mines in glebe land were illegally opened by the rector in 1850. In 1885 his successor agreed, subject to the consent of the Ecclesiastical Commissioners being obtained, to lease the mines at certain royalties, which for some years were received by him and paid to the Commissioners, who repeatedly pointed out that the working was informal, and that a lease with their consent ought to be applied for. Early in 1894 the tenant applied for a lease, which was refused bonâ fide and for adequate reasons;—*Held*, that the Commissioners were entitled to an injunction to prevent the further working of the mines. *Holden* v. *Weekes* (1 J. & H. 278) explained. ECCLESIASTICAL COMMISSIONERS *v.* WODEHOUSE [552

2. —— *Union of Benefices Act*, 1860 (23 & 24 *Vict. c.* 142)—*Union of Benefices Amendment Act*, 1871 (34 & 35 *Vict. c.* 90), *s.* 4—*Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict. c.* 34), *s.* 1—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *ss.* 2, 3, 5—*Open Spaces Act*, 1887 (50 & 51 *Vict. c.* 32), *ss.* 2, 4, *and Schedule*—"*Set apart*

ECCLESIASTICAL LAW—*continued.*

for the purpose of Interment"—Site of Church—Statute—Construction.] The power to build on the site of a metropolitan church sold under a scheme made in pursuance of the Union of Benefices Act, 1860, is not interfered with by the Union of Benefices Amendment Act, 1871. The site of a church where intramural burial has taken place has not been "set apart for the purposes of interment," and therefore, when so sold, is not within the prohibition against building in the Disused Burial Grounds Act, 1884, as affected by the Open Spaces Act, 1887, and the Metropolitan Open Spaces Act, 1881. Sect. 5 of the Disused Burial Grounds Act, 1884, applies to dispositions made after the Act. *In re* Ecclesiastical Commissioners and New City of London Brewery Company's Contract - - 702

ELECTRIC LIGHTING—Nuisance—Vibration *See* Nuisance. [287

ENDOWMENT—Jurisdiction of Charity Commissioners - - - - 367
See Charity. 2.

ESTOPPEL—*Judgment by Consent—Action for Instalment under Agreement—Denial of Agreement—Effect of Judgment as to establishing Agreement—Company—Winding-up—Proof of Debt.*] A judgment by consent, or default, is as effective as an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case. An action was brought against a company to recover an instalment of a debt alleged to be due under an agreement, the existence of which was denied by the company.—*Held* (affirming the decision of Vaughan Williams J.), that judgment by consent for the Plaintiffs precluded the liquidator in the winding-up of the company from denying the existence of the agreement on a proof being sent in for the total amount due under the agreement. *Jenkins* v. *Robertson* (Law Rep. 1 H. L., Sc. 117) distinguished. *In re* South American and Mexican Company. *Ex parte* Bank of England - C. A. 37

—— Patent declared invalid—Petition for revocation - - - - 687
See Patent.

EVIDENCE—Documents—Exhibit to affidavit—Right of inspection - - 117
See Practice. 6.

EXAMINATION—Public—Winding-up 3, 395
See Company. 10, 11.

EXECUTION CREDITOR—Sale—Company—Intervention by debenture-holder - 734
See Company. 1.

FRAUD—Of partner—Liability of firm - 236
See Partnership. 1.

FRIENDLY SOCIETY—*Objects of Society exhausted—Unexpended Funds—Charity—Cy-près—Bona Vacantia—Resulting Trust.*] In 1810 a society was established to raise a fund, by the subscriptions, fines, and forfeitures of its members, to provide annuities for the widows of its deceased members. In 1830 the rules were revised, and the society conformed to the provisions of the Friendly Societies Act, 1829, but the objects of the society were in no way altered. In 1848 E. became a member, and remained a member till 1878, when he died a widower. E. was the last surviving member. The last honorary member, who on joining disclaimed all benefit of the society for his widow, died in 1879. The last annuitant died in 1892.—The legal personal representative of E. having claimed the unexpended funds of the society, amounting to £1250:—*Held*, that the society was not a charitable institution to which the doctrine of cy-près could be applied, and that on this point the fact that there were honorary members, whose donations were applicable for the benefit of the widows of members, made no difference; that the representatives of E., the surviving member, were not entitled to the funds, neither was the Crown entitled to them as bona vacantia, but that there was a resulting trust in favour of the members of the society from time to time, or their respective legal personal representatives, in shares, in proportion to the amounts contributed by each member to the funds of the society. Cunnack *v.* Edwards - - - - - 489

GLEBE—Inclosure—Award—Improvements—Settled Land Acts - - 348
See Settled Land Acts.

—— Mines under - - - - 552
See Ecclesiastical Law. 1.

GUARANTY—Notice determining liability 573
See Principal and Surety.

HUSBAND AND WIFE—*Married Woman—Interest for Life for separate use, followed by general Testamentary Power of Appointment and Limitation to Executors, Administrators, or Assigns—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 2.] Bequest to trustees, in trust to pay income to a woman married subsequently to the Married Women's Property Act, 1882, for her life for her separate use, and as to the capital for such persons as she should appoint by will, and, in default of appointment, for her executors, administrators, or assigns:—*Held*, that by virtue of the Married Women's Property Act, 1882, the life interest and the interest in reversion were alike limited to the separate use of the married woman, and that, on her releasing her power, she would be absolutely entitled.—*Whittle* v. *Henning* (2 Ph. 731) held not applicable. *In re* Davenport. Turner *v.* King - - 361

—— Money lent by wife to husband—Insolvent estate—Priority - - - 652
See Administration.

—— Post-nuptial settlement—Cesser of husband's interest on bankruptcy - 505
See Bankruptcy. 3.

—— Restraint on anticipation—Concurrence of wife in breach of trust - - 544
See Trustee. 1.

—— Settlement—After-acquired property 109
See Settlement. 1.

INCLOSURE—*General Rules for Construction of Inclosure Acts—Separate Ownership of Surface and Minerals—Right to work Minerals—Right to*

INCLOSURE—*continued.*

Support—Damage to Surface Owner—Right to let down Surface—Burden of Proof—Clear Words—Compensation Clause, Presence or Absence of.] In construing Inclosure Acts each Act has to be interpreted according to its own provisions.—The general rules for the construction of such Acts are the following:—Where the ownership of the minerals and of the surface is severed, the primâ facie inference is that the owner of the surface shall enjoy the surface allotted, and shall have the common right of support for his tenement.—In order to rebut this inference the burden lies on the owner of the minerals to shew affirmatively and by clear words that he has the right of letting down the surface. But express words are not required.—The presence or absence of a compensation clause is an important element in the construction of such Acts. The primâ facie inference in favour of the surface owner is strengthened by the absence of any provision for compensation, though the presence of a limited compensation clause is not of itself sufficient to rebut the inference. BELL *v.* EARL OF DUDLEY [182

—— Award to vicar and his successors - 348
See SETTLED LAND ACTS.

INDEMNITY — Costs of action—Agreement to conduct defence - - - 11
See PRACTICE. 4.

INFANT—*Legacy by Parent to Infant Child—Interest by way of Maintenance—Exception to General Rule—Other Provision by Testator for Maintenance—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43—*Incorporation of Section into Will.*] A legacy by a parent to an infant child carries interest by way of maintenance from the death of the testator, notwithstanding that the will contains a provision for the maintenance of the child out of the income of the legacy, or out of the income of a share of residue given to him equally with the other children.—The provisions of sect. 43 of the Conveyancing Act, 1881, as to the maintenance of infant legatees must, for the purpose of determining whether a legacy to an infant child carries interest, be treated as incorporated into any will to which they are applicable.—A testator bequeathed a legacy to his infant son payable at twenty-one, and legacies to his daughters, one of whom was an infant, and gave his residuary real and personal estate to trustees upon trusts in favour of his children equally. He declared that his trustees might at their discretion raise any part not exceeding one moiety of the expectant share of any child, and apply the same for his or her advancement, preferment, or benefit. The will contained no express provision for the maintenance of infant children out of income or otherwise, but the provisions contained in sect. 43 of the Conveyancing Act, 1881, were applicable;—*Held*, that sect. 43 of the Conveyancing Act, 1881, ought to be read as part of the will, but that, though it were so read, yet there was nothing in the will to displace the application of the general rule applicable to legacies to infant children, and accordingly that the legacies to the infant son and daughter respectively carried interest as from the death of the testator. *In re* MOODY. WOODROFFE *v.* MOODY - 101

INJUNCTION — When granted as of right — Damages in lieu of - - 287
See NUISANCE.

INSPECTION OF DOCUMENTS — Practice — Lunacy - - - - 439
See LUNATIC. 2.

INTEREST—Legacy to infant—Maintenance
See INFANT. [101

INTERROGATORIES—Relevancy - - 334
See PRACTICE. 7.

INVESTMENT—Trustee—Right of cestui que trust in remainder to discovery - 474
See TRUSTEE. 2.

JUDGMENT—By consent—Estoppel - 37
See ESTOPPEL.

JURISDICTION—Foreign representation of English drama - - - - 534
See COPYRIGHT.

LANDLORD AND TENANT — Proof by lessor against company in winding-up 378, 753
See COMPANY. 14, 15.

LANDS CLAUSES ACT—*Railway Company—Special Act—Underground Railway—Subsoil used apart from Surface—"Appropriate and use"—Tunnel—Easement—"Land"—Purchase—Compensation—Entry on Lands before Agreement—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 3, 18, 68, 84, *&c.*] A special Act (incorporating the Lands Clauses Consolidation Act, 1845) authorized a railway company to construct an underground railway, and provided that, with respect to certain lands belonging to the Plaintiff, the company should not be required wholly to take them, but might "appropriate and use the subsoil and under-surface," subject, however, to the liability to make compensation under sect. 68 of the Lands Clauses Act.—The company commenced boring through the subsoil of the Plaintiff's land for the purpose of making a tunnel, but without having given him a notice, under sect. 18 of the Lands Clauses Act, to treat for the purchase of the subsoil so used:—*Held*, that the company were taking not merely an easement, but "land"; that "appropriate" meant "appropriate by way of purchase"; and that therefore they could not "appropriate and use" the subsoil without first complying with the provisions of the Lands Clauses Act as to the purchase of land.—*Semble*, the 84th and following sections of the Lands Clauses Act, as to the deposit of purchase-money in case of entry on lands before agreement, apply to the appropriation and user of subsoil under a special Act such as that above mentioned. FARMER *v.* WATERLOO AND CITY RAILWAY COMPANY - - 527

LEASE—Solicitor's remuneration—Scale charge
See SOLICITOR. 1, 2. [73, 524

LEGACY—Payment out of mixed fund - 499
See WILL. 2.

—— Satisfaction of debt - - - 516
See WILL. 5.

LICENCE—To use blocks for printing—Verbal licence - - - - 567
See COPYRIGHT. 2.

LIMITATIONS, STATUTE OF—*Hedge and Ditch —Presumption of Ownership—Dispossession—Acts of Ownership—Real Property Limitation Acts*, 1833 *and* 1874 (3 *&* 4 *Will.* 4, *c.* 27, *s.* 3; 37 *&* 38 *Vict. c.* 57, *s.* 1).] The Plaintiff and Defendant were owners of adjacent houses. The gardens of the two houses were formerly separated by an open ditch, and on the Plaintiff's side of the ditch was a hedge. In 1868 the owner of Plaintiff's house laid drain-pipes along the ditch, into which he allowed the drainage of his own and the Defendant's house to run, and at the same time covered in the ditch. From that time the surface of the ditch was used by the owner of Defendant's house as part of his garden; and more than twelve years before the action was brought the Defendant paved part of the surface with cobble-stones and laid cinders on part, and also planted a rose-garden and made a fowl-house on other parts. But the Plaintiff continued to cut his hedge from the Defendant's side, and on two occasions opened the ditch to clean out the drains:—*Held* (reversing the decision of the Vice-Chancellor of the County Palatine of Lancaster), that, assuming that the Plaintiff was the original owner of the ditch, he had lost the ownership of the surface by lapse of time, the acts of ownership of the Defendant having been sufficient to dispossess him within the meaning of the 3rd section of the 3 & 4 Will. 4, c. 27.—*Leigh* v. *Jack* (5 Ex. D. 264) distinguished.—*Quære*, whether the presumption that a ditch belongs to the owner of the adjacent hedge applies to a natural watercourse or only to an artificial ditch. MARSHALL *v.* TAYLOR **C. A. 641**

2. —— *Mortgage—Extinguishment of Title of Second Mortgagee — Possession of Mortgagor — —Vesting of Legal Estate—Statute of Limitations*, 1833 (3 *&* 4 *Will.* 4, *c.* 27), *s.* 34—*Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57), *s.* 8.] Sect. 34 of 3 & 4 Will. 4, c. 27, which provides that at the determination of the statutory period of limitation for bringing an action "the right and title" to the land shall be extinguished, applies as between a mortgagee and a mortgagor in possession, and in favour of the latter, although a prior mortgage has been in existence during the earlier part of such statutory period.—The effect of barring the mortgagee's title is to vest the legal estate in the mortgagor, and therefore, if he afterwards grants a mortgage to another person, and the subsequent mortgagee brings an action against the mortgagor and the mortgagee against whom the statute has run, to enforce his security, the Plaintiff may rely on such extinguishment of title in support of his own claim as first mortgagee, although the mortgagor does not rely on the statute and has, after the expiration of the statutory period, given his co-Defendant a written acknowledgment. KIBBLE *v.* FAIRTHORNE - - - - - - 219

—— Costs of trustees—Taxation of costs - 202
See PRACTICE. 5.

LIQUIDATOR—Costs—Successful litigant
See COMPANY. 7, 8. [333, 758

—— Voluntary—Debt due to—Winding-up petition - - - - - 578
See COMPANY. 12

LOCAL GOVERNMENT—*Water Supply—Waterworks Company—Local Authority—Restriction on Construction of "Waterworks"—Notice—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 51, 52, 55.] Sect. 51 of the Public Health Act, 1875, authorizing a local authority to supply its district with water, must be read in connection with sect. 52, with the result, that the prohibition contained in the latter section is not absolute but one of degree, which is not intended to apply to a case where the local authority already has substantial waterworks, so as to prevent it from adding to or improving them.—The provision in sect. 52, requiring notice to be given by the local authority before commencing to "construct waterworks" within the limits of supply of any water company, applies only to "new waterworks," and does not apply to additions or improvements in existing waterworks. CLEVELAND WATER COMPANY *v.* REDCAR LOCAL BOARD - - 168

LUNATIC—*Person lawfully detained as a Lunatic —Settlement of Stock—Power to appoint New Trustees—Quasi Lunatic Donee of Power—Order authorizing Person to execute Power on behalf of Quasi Lunatic by appointing Two named Persons as New Trustees, and also vesting in them when appointed the Right to call for a Transfer of the Stock—Jurisdiction—Bank of England—"Clean Order"—Lunacy Act*, 1890 (53 *&* 54 *Vict. c.* 5), *s.* 116, *sub-ss.* 1 (*c*), 2, 3; *ss.* 128, 129, 142—*Costs.*] Where a lunatic is donee of a power of appointing new trustees of a settlement, the judge has jurisdiction, under sects. 128 and 129 of the Lunacy Act, 1890, to authorize the committee of the lunatic to exercise the power on his behalf by appointing persons named in the order to be new trustees of the settlement; and where the settlement comprises bank annuities the order of the Judge may properly go on to authorize the persons so named, upon their appointment as trustees, to call for a transfer of the bank annuities into their own names, to receive the dividends until transfer, and to hold the stock when transferred upon the trusts of the settlement. *In re* SHORTRIDGE - - - - **C. A. 278**

2. —— *Practice—Deceased alleged Lunatic—Inspection of Documents—Privilege.*] No one is allowed to inspect documents in the custody of the Court in Lunacy without an order of one of the Masters or of a Judge in Lunacy.—Inspection of the reports made to the Court by its own medical advisers is never permitted.—But, with this exception, liberty to inspect documents will be given to any person who can satisfy the Master or a Judge that he wants it for a reasonable and proper purpose, provided that the lunatic, if living, is not injured thereby.—After the death of the lunatic, the general rule is to allow inspection to any person claiming an interest in his property who can satisfy the Court as above mentioned.—As a matter of law, privilege is no bar to inspection in Lunacy.—Inspection will not be permitted to a litigating party who applies for it, before the trial of the litigation, in order to find out his adversary's case.—The doctrine of privilege, and the principles applicable to inspection, discussed and explained.—An order for an inquiry as to the sanity of an alleged lunatic was made upon the petition of A. While the

LUNATIC—*continued.*
inquiry was pending the alleged lunatic died, having made a will in favour of B. A. then brought an action in the Probate Division against B., alleging that the will had been made under undue influence while the testator was insane, and was invalid. B. counter-claimed, asking for probate, and applied in the lunacy for liberty to inspect the petition and the affidavits in support thereof, which were in the custody of the Court, in order that she might ascertain what allegations of mental incapacity were intended to be made at the trial of the action, and that she might have an opportunity of rebutting them:—*Held*, that an order for inspection ought not to be made in such a case. *In re* H. W. Strachan [C. A. 439

MAINTENANCE—Infant - - - 101
See Infant.

MALA FIDES—Indirect motive—Interference with watercourse - - - 145
See Watercourse.

MINE—Right to—Support of surface—Construction of Inclosure Acts - 182
See Inclosure.

—— Under glebe lands - - - 552
See Ecclesiastical Law. 1.

MIXED FUND—Rateable payment of legacies
See Will. 1. [499

MORTGAGE — *Colliery — Implied Transfer of Business—Mortgagee in Possession—Manager and Receiver — Mortgage by Company — Validity of Deed irregularly executed.*] A colliery company executed a mortgage to a banking company by sub-demise of their lands, mines, and seams of coal and other premises comprised in certain leases, and also their buildings and some of their fixed machinery. Default having been made of principal and interest, the bank took possession of the mines and appointed a receiver of the income, but did not work the mines. They afterwards brought a foreclosure action against the colliery company, and moved for a receiver and manager of the colliery:—*Held* (reversing the decision of North J.), (1.) that although the business of the colliery was not expressly mentioned in the mortgage deed, it was intended to pass and did pass to the mortgagees, and that they were entitled to apply in the action for a receiver and manager of the colliery; (2.) that the Court would, in the exercise of its discretion, appoint a receiver and manager, although the mortgagees had taken possession and appointed a receiver of the income. —*Whitley* v. *Challis* ([1892] 1 Ch. 64) distinguished.—The directors of a joint stock company had power under their articles to fix the number of directors which should form a quorum. By a resolution they fixed three as a quorum. A meeting of directors, at which two only were present, authorized the secretary to affix the company's seal to a mortgage, which was accordingly done by the secretary in the presence of the same two directors:—*Held*, that as between the company and the mortgagees, who had no notice of the irregularity, the execution of the deed was valid.—*Royal British Bank* v. *Turquand* (6 E. & B. 327) and *Mahony* v. *East Holyford Mining Company* (Law Rep. 7 H. L. 869) followed. County of Gloucester Bank *v.* Rudry Merthyr Steam and House Coal Colliery Company C. A. 629

2. —— *Consolidation — First Mortgages of different Properties to distinct Mortgagees—Second Mortgage of all Properties to one Mortgagee—Subsequent Union of First Mortgages—Redemption.*] The owner of several houses in the years 1863–1866 executed first mortgages of them to different mortgagees for distinct sums. In 1868 he gave a second mortgage on all the houses to the Plaintiff's predecessors in title. In 1885 the second mortgage was transferred to the Plaintiff. Before 1893 all the first mortgages had become vested in the Defendants. In 1893 the Plaintiff brought an action against the Defendants to redeem two of the first mortgages upon payment of the amount due under them only.—It was held by Romer J., following *Vint* v. *Padget* (2 De G. & J. 611) and *Tweedale* v. *Tweedale* (23 Beav. 341), that the Defendants were entitled to consolidate all the first mortgages:—*Held*, by the Court of Appeal, that *Vint* v. *Padget*, being the decision of a Court of co-ordinate jurisdiction, could not be overruled by their Lordships, and that the appeal must be dismissed. Pledge *v.* Carr - C. A. 51

—— Deceased mortgagee—Personal representative—Vesting order - - 700
See Trustee. 4.

—— Possession of mortgagor—Statute of Limitations - - - - - 219
See Limitations, Statute of. 2.

—— Ship—Registration—Priority - 408
See Ship.

MORTMAIN—Reversionary interest in land 422
See Charity. 4.

NOTICE—Mortgage—Ship—Priority—Registration - - - - - 408
See Ship.

NUISANCE—*Statutory Powers—Electric Lighting —Vibration—Noise—Structural Damage—Right of Reversioner to Sue—Injunction—Damages—Electric Lighting Act*, 1882 (45 & 46 *Vict. c.* 56), *ss.* 10, 12, *sub-s.* 2, *ss.* 17, 32—*Electric Lighting Act*, 1888 (51 & 52 *Vict. c.* 12)—*Lord Cairns' Act* (21 & 22 *Vict. c.* 27) — *Jurisdiction.*] Lord Cairns' Act (21 & 22 Vict. c. 27), in conferring upon Courts of Equity a jurisdiction to award damages instead of an injunction, has not altered the settled principles upon which those Courts interfered by way of injunction; and in cases of continuing actionable nuisance, the jurisdiction so conferred ought only to be exercised under very exceptional circumstances.—There is nothing in the Electric Lighting Act, 1882, to relieve undertakers thereunder from liability to an action at common law for nuisance to their neighbours caused by their works.—Sect. 10 of the Electric Lighting Act, 1882, read together with sect. 32 thereof, is confined to construction of the works required to supply electricity, and does not apply to their subsequent user; and sect. 17 refers to payment of compensation for damages caused by the execution of such

NUISANCE—*continued.*

works, and not to damages caused by their user when constructed.—An electric lighting company erected powerful engines and other works on land near to a house which was subject to a lease. Owing to excavations for the foundations of the engines, and to vibration and noise from the working of them, structural injury was caused to the house, and annoyance and discomfort to the lessee. The lessee and the reversioners brought separate actions against the company for an injunction and damages in respect of the nuisance and injury thus occasioned.—Kekewich J., after finding on the evidence that the Defendants had created a continuing nuisance as regards the lessee, and had caused structural injury to the house, *held*, that both the lessee and the reversioners were entitled to relief, but, under the circumstances, by way of damages and not of injunction.—The Plaintiffs in both actions appealed against the refusal of the injunction; and the Court of Appeal *held* that there was nothing in either case to justify the Court in refusing to aid, by injunction, the legal rights which had been established, and that the appeal must be allowed.—Per A. L. Smith L.J.: It may be stated as a good working rule that damages may be given in substitution for an injunction in cases where there are found in combination the four following requirements, viz., where the injury to the plaintiff's legal rights is (1.) small, (2.) capable of being estimated in money, (3.) can be adequately compensated by a small money payment, and (4.) where the case is one in which it would be oppressive to the defendant to grant an injunction. SHELFER *v.* CITY OF LONDON ELECTRIC LIGHTING COMPANY. MEUX'S BREWERY COMPANY *v.* CITY OF LONDON ELECTRIC LIGHTING COMPANY - - - - **C. A. 287**

OFFICIAL RECEIVER—Winding up of company—Public examination—Report—Allegations as to fraud - - - **3**
See COMPANY. 10.

OPTION OF PURCHASE—Will—Codicil confirming will—Conversion - - **724**
See WILL. 4.

ORDER—Rehearing—Jurisdiction - **141**
See PRACTICE. 9.

PARTNERSHIP—*Liability for Acts of one Partner—Firm of Solicitors—Deposit of Securities payable to Bearer—Scope of Partnership—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *ss.* 11, 12.] The Plaintiff applied to R., a member of a firm of solicitors, to obtain for him a loan on the mortgage of his freehold estate. R. obtained the loan from some clients of the firm, but informed the Plaintiff that the mortgagees required collateral security as well; and the Plaintiff accordingly deposited with R. certain share warrants payable to bearer. A mortgage deed of the freehold estate was then prepared by R. and executed by the Plaintiff, in which, however, no mention was made of the deposit of the share warrants or of any collateral security. The mortgagees had not in fact required collateral security, and neither they nor R.'s partners had any knowledge of the

PARTNERSHIP—*continued.*

deposit of the share warrants. R. afterwards sold the shares and appropriated the proceeds to his own use and absconded. On two previous occasions the plaintiff had deposited the same securities with R. to enable him to raise temporary loans, notice of which transactions appeared in the books of the firm; and it appeared that the firm were in the habit of holding securities payable to bearer, and also sums of money, for their clients:—*Held* (reversing the decision of Kekewich J.), in an action by the Plaintiff to redeem the mortgage and to make the mortgagees and the partners of R. liable for the loss of the shares, that it was within the scope of the apparent authority of R. to take the custody of the share warrants payable to bearer, and that his partners were liable for his misappropriation of them:—But *held* (affirming the decision of Kekewich J.), that as the mortgagees had given no instructions to R. to obtain collateral security, and were ignorant of the deposit of the share warrants, he was not their agent in receiving them, and they were not responsible for their loss.—*Cleather* v. *Twisden* (28 Ch. D. 340) considered and distinguished. RHODES *v.* MOULES - - - **C. A. 236**

2. —— *Partnership Books—Right of Partner to make Copies of Entries—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 24, *sub-s.* 9.] *Held* (by Stirling J. and by the Court of Appeal), that a partner is entitled during the continuance of the partnership to make copies of entries in the partnership books, even with the avowed object of using those entries after the termination of the partnership to assist him to compete in business with his former partners. TREGO *v.* HUNT [C. A. 462

PATENT—*Validity—Infringement—Revocation—Estoppel—Patents, &c., Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 26.] In an action for infringement of a patent, the Court held that one of the claims in the specification had been anticipated, and declared the patent invalid. The Defendant then presented a petition for revocation of the patent.—*Held*, that the Plaintiffs were not estopped from setting up the validity of the claim on the petition. *In re* DEELEY'S PATENT - **C. A. 687**

PETITION—Winding up of company—Petitioning creditor—Debt due to voluntary liquidator - - - - **578**
See COMPANY. 12.

POWER—Appointment—Copyholds - **716**
See WILL. 5.

—— To appoint trustee—Lunatic—Order authorizing person to execute power - **278**
See LUNATIC. 1.

PRACTICE—*Appeal—Order of Single Judge of Court of Appeal—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 52—*Supreme Court of Judicature (Procedure) Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 1 (*b*).] A motion to discharge or vary an order of a single Judge of the Court of Appeal, under the 52nd section of tha Judicature Act, 1873, is not an appeal within the meaning of the 1st section of the Supreme Court of Judicature (Procedure) Act, 1894, and may be made without leave of the Judge or of the Court of Appeal. BOYD *v.* BISCHOFFSHEIM - - - **C. A. 1**

PRACTICE—*continued.*

2. —— *Appeal—Order in Chambers—Motion to Discharge—Leave from Judge or Court of Appeal—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 50—*Supreme Court of Judicature* (*Procedure*) *Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1.] Notwithstanding the regulations as to appeals in sect. 1 of the Supreme Court of Judicature (Procedure) Act, 1894, an unsuccessful litigant in Chambers in the Chancery Division still has three alternatives—either to move before the Judge in Court to discharge the order made in Chambers, or to have the matter adjourned into Court, or to obtain leave from the Judge to go to the Court of Appeal direct upon his certificate that no further argument is required. But, with a view to preventing delay and expense, the Court will, as far as possible, discourage motions to discharge orders made in Chambers.—A motion to discharge an order made in Chambers is not an "appeal," but a rehearing. BOAKE *v.* STEVENSON - **358**

3. — *Appeal—Time for Appealing—"Refusal of an Application"—Order* LVIII., *r.* 15.] A judgment or order of the Court refusing part of the relief sought by the Plaintiff, and granting other part of such relief, is not "the refusal of an application" within the meaning of Order LVIII., r. 15, so as to cause the time for appealing therefrom to run from the date when the judgment or order was made. SHELFER *v.* CITY OF LONDON ELECTRIC LIGHTING COMPANY. MEUX'S BREWERY COMPANY *v.* CITY OF LONDON ELECTRIC LIGHTING COMPANY - - - - **C. A. 287**

4. —— *Conduct of Action—Agreement that a Third Party shall conduct Defence of Action—Retainer of Solicitor—Appeal to House of Lords—Withdrawal of Retainer—Injunction.*] The Defendant in an action for the infringement of a patent for machines agreed with M., from whom he had purchased the machine complained of, that M. should have the sole conduct of the defence of the action and that his solicitor should be employed in the proceedings, on giving an indemnity to the Defendant against damages and costs.—A deed of indemnity was accordingly executed, and the Defendant gave a retainer to M.'s solicitor to act for him "in the defence of the action and any appeals therefrom." The action was tried and an appeal brought to the Court of Appeal, in which the Defendant was defeated. An appeal was then presented in his name to the House of Lords, and a deposit for costs paid; but the Defendant, wishing to stop the proceedings, withdrew his retainer of M.'s solicitor, and took steps to withdraw the appeal to the House of Lords;—*Held*, that M. was entitled to an injunction to restrain the Defendant from breaking his agreement to allow M. to conduct the defence, and from withdrawing his retainer of M.'s solicitor. But under the circumstances the Court took an undertaking from M. to give a further indemnity against extra costs in the House of Lords. MONTFORTS *v.* MARSDEN [C. A. 11

5. —— *Costs — Taxation — Items barred by Statute of Limitations—Costs, Charges, and Expenses of Trustees—Costs payable by Trustees to their Solicitors—Voluminous Correspondence used at Trial—Discretion and Duty of Taxing Master.*]

PRACTICE—*continued.*

By the judgment in an action it was referred to the Taxing Master to tax as between solicitor and client the costs of the retiring trustees of a settlement, including therein any charges and expenses that had been properly incurred by them as such trustees, and they were to pay and retain such costs when taxed out of the capital moneys subject to the trusts of the settlement. The bill of costs carried in by the trustees included items for costs which were statute-barred. Some of these amounts had been actually paid by the trustees to their solicitors after they were barred, and others remained unpaid, but the trustees desired to pay them:—*Held*, that the object of the direction for taxation was to give effect to the trustees' right of indemnity, which extended not merely to claims which could be enforced by action, but to all fair claims of every kind, and that therefore these costs, which the trustees had properly incurred, and which were paid or payable to their solicitors, ought, notwithstanding that they were statute-barred, to be included in the costs which were to be paid and retained out of the capital moneys subject to the settlement.—The allowance on taxation of the costs of copies of correspondence used at the trial of an action is a matter for the discretion of the Taxing Master; but in exercising his discretion he ought to ascertain what part of the correspondence was in his judgment necessary and proper to be supplied to counsel and the Court for the proper argument and decision of the case. Where, in answer to objections to his taxation of the costs of such a correspondence, the Taxing Master merely stated that he had allowed one-third, i.e., 1159 folios, "which in his judgment and discretion comprised all that was necessary and proper to allow," the matter was referred back to him; but, on his reporting that he had reconsidered the matter from the point of view above indicated, and had arrived at a conclusion not substantially differing from that at which he had previously arrived, a summons to vary his certificate was dismissed. BUDGETT *v.* BUDGETT - - - - - **202**

6. —— *Evidence—Affidavit, Exhibit to—Right of Inspection.*] Irrespective of any question as to discovery, property, or privilege, if a document is made an exhibit to an affidavit, any person who has the right to inspect and take copies of the affidavit has a similar right as to the exhibit also. *In re* HINCHLIFFE - - **C. A. 117**

7. —— *Interrogatories—Relevancy—Previous Transactions between the same Parties—Rules of Supreme Court*, 1883, *Order* XXXI., *r.* 1.] An action was brought for a declaration that a piece of land which had been purchased by the Defendant and C. in 1873 was purchased by them as co-partners, and for accounts of the partnership and consequential relief. The Defendant denied the partnership. The Plaintiff exhibited interrogatories to the Defendant asking for particulars of purchases of land by the Defendant and C. previous and subsequent to 1873, in order to prove that they had been co-partners in various other purchases similar to that of 1873:—*Held* (reversing the decision of the Vice-Chancellor of the County Palatine of Lancaster), that the interrogatories were irrelevant to the issue in the

PRACTICE—*continued.*
action and oppressive, and that they ought not to be allowed. KENNEDY *v.* DODSON - C. A. 334

8. —— *Receiver—Receiver's Recognizance—Rents and Profits of Real Estate—Insurance Money—Repairs—Sureties—Extent of Liability.*] In ascertaining the liability of sureties under a receiver's recognizance, the Court proceeds on the principle that the surety is liable (to the extent of the amount of the penalty) for all sums of money which the receiver himself was properly liable to pay into Court or account for: consequently, where a receiver of "rents and profits" of real estate had (1.) insured some of the farm buildings in his own name, and received and misapplied the insurance money, had (2.) received, and not accounted for, dividends on Consols in Court representing proceeds of sale of real estate, had (3.) received, under an order of the Court, money representing personal estate, to be spent in repairs, which he had misappropriated:—*Held*, that the sureties had been properly charged in respect of these three items.—Practice and duties of receivers of rents and profits as to insurance and repairs discussed. *In re* GRAHAM. GRAHAM *v.* NOAKES - 66

9. —— *Rehearing—Order of Court—Misrepresentation—Jurisdiction.*] The Court has no jurisdiction to rehear or alter an order after it has been passed and entered, provided that it accurately expresses the intention of the Court.—An application was made in an action that certain costs which the Applicant had by a previous order in the action been directed to pay might be made costs in the action, and for a stay of proceedings under the order on the ground that the order had been obtained by misrepresentation:—*Held* (affirming the decision of the Vice-Chancellor of the County Palatine of Lancaster), that this was in effect an application to rehear the previous order, and that the Court had no jurisdiction to entertain it.—*Staniar* v. *Evans* (34 Ch. D. 470) observed upon. PRESTON BANKING COMPANY *v.* WILLIAM ALLSUP & SONS - - C. A. 141

10. —— *Review, Action of—Summons under Vendor and Purchaser Act.*] Where a good title has been declared on a summons under the Vendor and Purchaser Act, 1874, the purchaser is not at liberty to reopen the question by way of review, unless he can prove that since the order on the summons he has discovered material facts, which he could not with reasonable diligence have discovered earlier, shewing that the title is defective; in which case he may bring an action of review, the jurisdiction of the old Court of Chancery as to allowing proceedings by way of review being still exercisable by the Chancery Division of the High Court: but, *semble*, an action of review can now be commenced without leave. *In re* SCOTT AND ALVAREZ'S CONTRACT. SCOTT *v.* ALVAREZ - - - - C. A. 596

—— Debenture-holders' action—Form of judgment - - - - - 776
See COMPANY. 2.

—— Lunacy—Inspection of documents - 439
See LUNATIC. 2.

—— Trustee Acts—Vesting order - - 538
See TRUSTEE. 3.

PRECATORY TRUST—Construction of will 373
See WILL. 3.

PRINCIPAL AND SURETY—*Express Power to give Notice determining Liability of Guarantor—Effect of Notice only of Guarantor's Death—Meaning of "Representatives."*] A joint and several continuing guaranty bond provided that the obligors, or any one or more of them, or their respective "representatives," might determine their or his liability by a month's notice in writing to the obligees. One of the obligors having died, his executor, who was unaware of the bond, gave the obligees notice only of his death:—*Held*, that "representatives" included executors, and that, notwithstanding the notice, the estate of the deceased obligor was liable for indebtedness incurred by the principal debtors after his death.—Observations of Bowen J. in *Coulthart* v. *Clementson* (5 Q. B. D. 42, 48) considered. *In re* SILVESTER. MIDLAND RAILWAY COMPANY *v.* SILVESTER - - - - - 573

—— Surety for receiver—Extent of liability 66
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PUBLIC EXAMINATION—Winding-up 3, 395
See COMPANY. 10, 11.

RAILWAY—*Commissioners—Jurisdiction, whether exclusive—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 6—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *ss.* 9, 10.] The special Act of the Plaintiff company provided, by sect. 23, sub-sect. 1, that the Defendant company should punctually and regularly forward, and afford all reasonable facilities for, goods and mineral traffic destined for or coming from the undertaking of the Plaintiff company, from or to certain specified places, at rates per mile not greater than the lowest rate which should for the time being be charged by the Defendant company for like traffic to or from certain specified docks; and, by sub-sect. 3, that, if at any time, on application made by the Plaintiff company to the Railway Commissioners sitting as arbitrators, the Commissioners should decide that the Defendant company had failed to give any of the facilities therein provided for, and should not, within reasonable time after notice, have remedied such failure, then the Plaintiff company might run over and use with their engines, carriages, &c., certain specified portions of the railways belonging to the Defendant company:—*Held*, that, even if sub-sect. 3 applied to a complaint by the Plaintiff company that the Defendant company had been charging rates higher than they were authorized by sub-sect. 1 to charge, it did not confer on the Railway Commissioners an exclusive jurisdiction, and that the ordinary jurisdiction of the Courts was not ousted:—*Held*, also, that the Commissioners had not in such a case an exclusive jurisdiction by virtue of sect. 9 of the Railway and Canal Traffic

RAILWAY—*continued.*
Act, 1888, and sect 6 of the Railway and Canal Traffic Act of 1854. BARRY RAILWAY COMPANY *v.* TAFF VALE RAILWAY COMPANY - C. A. 128

—— Underground railway—Entry on land before agreement—Subsoil - - 527
See LANDS CLAUSES ACT.

RATES—Beneficial occupation — Liquidator of company - - - - 402
See COMPANY. 13.

RECEIVER—Mortgage of colliery—Mortgagee in possession - - - 629
See MORTGAGE. 1.

—— Official—Report of—Allegations of fraud—Public examination - - 3
See COMPANY. 10.

—— Recognizances—Liability of sureties 66
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RECTIFICATION—Voluntary deed - 742
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RES JUDICATA—Order for winding-up — Unregistered company - - 663
See COMPANY. 18.

RESCISSION—Contract — Wilful delay in rescinding - - - - 385
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RESTRAINT OF MARRIAGE—Condition—Will
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RESTRAINT ON ANTICIPATION — Power to remove—Concurrence of wife in breach of trust - - - - 544
See TRUSTEE. 1.

RETAINER OF SOLICITOR—Revocation - 11
See PRACTICE. 4.

REVENUE—*Power of Appointment—Successive Appointments—Account Duty—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*c*)—*Administration—Costs.*] The donee of a power of appointment over a sum of New 3 per cent. Annuities made successive appointments by deed of specific amounts of the annuities, subject to her own life interest, and by will appointed the amount not appointed by deed:—*Held*, that the account duty payable under the Customs and Inland Revenue Act, 1881, and costs of administering the fund must be borne by the appointees rateably. *In re* SHAW. TUCKET *v.* SHAW - - - - - 343

REVIEW — Action of — Discovery of material facts - - - - - 596
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RULES OF SUPREME COURT, Order XXXI., r. 1 - - - - - 334
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—— **Order LVIII., r. 15** - - - 287
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—— **Order LXV., r. 11** - - - 474
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RULES UNDER SOLICITORS' REMUNERATION ACT, 1881, r. 2, Sched. I., Part II.
See SOLICITOR. 1, 2. [73, 524

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SCHEME OF ARRANGEMENT—Winding-up—Proof of debts - - - 267
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SECURITY—Payable to bearer — Deposit with Solicitor - - - - 236
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SEPARATION DEED—Covenant to pay annuity —Concubinage - - - 455
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SETTLED LAND ACTS — *Glebe Lands—Lands allotted to Vicar "and his Successors"—Settlement —Improvements on Glebe Lands of the kind authorized by the Settled Land Act*, 1882—*Loan to Vicar—Security — Temporary Rent-charge — Redemption—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 69—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 21, 32—*Settled Land Acts Amendment Act*, 1887 (50 & 51 *Vict. c.* 30), *ss.* 1, 2.] An award, under an Inclosure Act to "A. B. and his successors, vicars of X." of lands in respect of glebe is not an instrument limiting an estate or interest in land "to or in trust for any persons by way of succession" so as to constitute "a settlement" within the meaning of sect. 2, sub-sect. 1, of the Settled Land Act, 1882.—But, where the purchase-moneys of glebe lands, comprised in such an award and afterwards taken by a railway company, are paid into Court, then by the combined operation of sect. 32 of the Settled Land Act, 1882, and sect. 69 of the Lands Clauses Consolidation Act, 1845, and upon the authorities, such moneys may be dealt with as capital moneys arising under the Settled Land Acts; and the Court has discretionary jurisdiction under the Settled Land Act, 1887, to authorize the application of them in the redemption of terminable rent-charges on the glebe created under the Land Improvement Act, 1864. *Ex parte* VICAR OF CASTLE BYTHAM, AND *Ex parte* MIDLAND RAILWAY COMPANY - - 348

SETTLEMENT—*Marriage Settlement—Covenant to Settle Wife's other and after-acquired Property — Income—Accumulations — Purchase by Wife during her Coverture—Loan—Charge in Favour*

SETTLEMENT—*continued.*

of Trustees.] If income not originally included in a covenant in a marriage settlement to settle other and after-acquired property is so invested as to indicate a permanent intention on the part of the owner to turn it into capital, such investment becomes subject to the covenant, provided the terms are sufficiently large to include it as capital.—The same result follows in the case of a sale of capital property not originally included in the covenant, where the proceeds are laid out in the purchase of other property coming within the terms of the covenant.—*Lewis* v. *Madocks* (8 Ves. 150; 17 Ves. 48) discussed. *In re* BENDY. WALLIS *v.* BENDY - - - - 109

2. —— *Voluntary Settlement—Trust for a Class—Period of ascertaining Class.*] The rule in *Andrews* v. *Partington* (3 Bro. C. C. 401) is not confined to wills, but is applicable to a voluntary settlement (and, *semble*, to a settlement for value).—A fund was settled by a voluntary deed upon such trusts as the settlor should appoint, and in default of appointment for such of the younger children of a third person as should attain twenty-one, or being daughters marry:—*Held*, that when one younger child attained a vested interest in possession the class was closed, and such child was entitled to be then paid a share. *In re* KNAPP'S SETTLEMENT. KNAPP *v.* VASSALL - - - - 91

3. —— *Voluntary Deed—Rectification—Action—Trial, Mode of—Evidence—Intention.*] The Court is reluctant to try actions for rectification of deeds except on oral evidence, unless there are circumstances which, in its opinion, justify a trial on affidavit evidence, such as where final written instructions are proved, and it is clear that the deed as executed departed from them.—The Court has jurisdiction, in a proper case, to reform or rectify a voluntary settlement, as well as a settlement for value: but the Court will hesitate to rectify a voluntary settlement at the instance of the settlor merely on his own evidence as to his intention, unsupported by other evidence, such as written instructions, even though the rectification sought would bring the settlement more into harmony with recognised precedents, and with what the settlor might reasonably have intended at the time. BONHOTE *v.* HENDERSON [742

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SHIP—*Mortgage—Equitable Charge—Debenture—Registration—Priority—Notice—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 43, 69—*Merchant Shipping Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 3—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 33, 56, 57.]

SHIP—*continued.*

Sect. 3 of the Merchant Shipping Act Amendment Act, 1862 (re-enacted by sect. 57 of the Merchant Shipping Act, 1894) did not repeal any part, but only explained the meaning, of sect. 69 of the Merchant Shipping Act, 1854 (re-enacted by sect. 33 of the Act of 1894).—Therefore, although equitable interests in ships are recognised, a legal mortgage of a ship, in statutory form and registered, has priority over an equitable charge previously given, even where the legal mortgagee takes with notice of the charge. BLACK *v.* WILLIAMS - - - - 408

SOLICITOR—*Costs—Agreement for Tenancy for less than Three Years—"Leases or Agreements for Leases at Rack-rents"—Scale Fee—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *ss.* 2, 4—*General Order under Solicitors' Remuneration Act*, 1881, *r.* 2, *Sched. I., Part II.—Lessor and Lessee—Cost of Counterpart.*] In the absence of any prior written agreement, the Taxing Master is bound to tax according to scale in all cases where the scale is applicable, notwithstanding the fact that an item bill has been delivered at the request of the client. The fact that a solicitor has delivered an item bill in the first instance does not preclude him, when before the Taxing Master, from consenting to its being taxed according to scale. *In re Heather* (Law Rep. 5 Ch. 694) held not to apply to such a case.—The costs of the lessor's solicitor "for preparing, settling, and completing" an agreement for a tenancy for less than three years at a rack-rent are to be taxed according to the scale prescribed for "Leases or Agreements for Leases at a Rack-rent" in Schedule I., Part II., to the General Order under the Solicitors' Remuneration Act, 1881.—In estimating the costs properly payable by the lessee to the lessor's solicitor, the cost of the counterpart or duplicate agreement must be deducted from the scale fee when ascertained. *In re* NEGUS 73

2. —— *Costs—Lease—Printed Form—Scale Charge—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order.*] Leases following a general printed form and requiring in each case only to be filled in with the names of the parties, the parcels, a plan, the rent, and so forth, are not subject to the scale charges in Part II. of Sched. I. to the rules under the Solicitors' Remuneration Act, 1881. WELLBY *v.* STILL - - - - - - 524

3. —— *Costs—Lien—"Property recovered"—Charging Order—Mortgage—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.] A solicitor who has already accepted from his client a mortgage or other security for his costs in a pending action to which the client is a party cannot obtain a charging order for his costs under s. 28 of the Solicitors Act, 1860, upon the property "recovered or preserved" in the action. GROOM *v.* CHEESEWRIGHT - - - - - - 730

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TRUSTEE—*Cestui que Trust—Breach of Trust at Request of Beneficiary—Subsequent Assignee of Beneficiary's Interest—Equity of Trustee to have Beneficiary's Interest Impounded — Married Woman—Restraint on Anticipation—Trustee Act,* 1888 (51 *&* 52 *Vict. c.* 59), *s.* 6—*Trustee Act,* 1893 (56 *&* 57 *Vict. c.* 53), *s.* 45.] The equity of a trustee who commits a breach of trust at the request and for the benefit of a beneficiary is not merely statutory since the passing of the Trustee Acts, 1888 and 1893, but is the same now as it was before those Acts, which in fact enlarge the judicial discretion of the Court in such cases.—Consequently, the equities affecting an assignee of the interest of a beneficiary are the same now as they were before those Acts.—A trustee who, at the time a breach of trust is committed, merely declines an offer to take a mortgage of the beneficiary's interest by way of security for the breach of trust, does not per se waive or abandon his equity.—It is the duty of a trustee to protect a married woman, restrained from anticipation, against herself when she asks him to commit a breach of trust, and if he knowingly commits a breach of trust at her request the Court will be slow to remove the restraint on anticipation in order that her life interest may be impounded to recoup him.—*Ricketts* v. *Ricketts* (64 L. T. (N.S.) 263) explained.—A married woman, restrained from anticipation, gave her written consent to a change of investment, but at the time was not informed by the trustees and did not know that such change was a breach of trust. The money was advanced to her husband, who to her knowledge was in difficulties, and she shared in the benefit arising from the breach of trust, which was instigated by her husband. The Court, in the exercise of its judicial discretion under sect. 45 of the Trustee Act, 1893, refused to remove the restraint on anticipation in order that her life interest might be impounded to recoup the trustees. Bolton *v.* Curre - - - **544**

2. —— *Cestui que Trust—Reversionary Legatee—Information as to Investment of Testator's Estate—Solicitor and Client — Costs — Personal Order against Solicitor—Rules of Supreme Court,* 1883, *Order* lxv., *r.* 11.] The Plaintiff, being beneficially entitled under a will to a one-ninth share of a sum of £900 expectant on the death of a tenant for life, demanded from the trustees of the will particulars of the investments of the testator's estate. The estate was amply sufficient for payment of the legacy:—*Held,* that the trustees were bound to furnish such particulars.—The Plaintiff's solicitor having shewn unreasonable haste in commencing litigation, the application for particulars was granted without costs as between the parties, but an order was made against the solicitor, under Order lxv., rule 11, that he should be disallowed his costs against his client. *In re* Dartnall. Sawyer *v.* Goddard [C. A. 474

TRUSTEE—*continued.*

3. —— *Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 35 (*ii.*) (*d*), 38—*Trustee refusing to Transfer Stock on Request—Vesting Order—Petition presented before Expiration of Twenty-eight Days after Request—Jurisdiction—Costs against Trustee—Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.] Jurisdiction to make a vesting order under sect. 35 of the Trustee Act, 1893, on the ground that a trustee has refused to transfer stock for twenty-eight days next after a request in writing made pursuant to the section, does not arise before the twenty-eight days have expired, and the Court cannot make an order upon a petition presented sooner. On petition for such a vesting order the Court has jurisdiction to order the Respondent, the recusant trustee, to pay the costs of the application. *In re* KNOX'S TRUSTS - - - - - 538

4. —— *Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 29 (*e*)—*Vesting Order—Deceased Mortgagee—Uncertainty as to Personal Representative—Disputed Will.*] A mortgagee of freehold land died, having made a will by which he appointed executors. The validity of the will was disputed by the testator's widow, and an action to establish the will had been commenced in the Probate Division, but had not yet been tried. The mortgage debt had been paid:—*Held*, that it was, within the meaning of sect. 29 (*e*) of the Trustee Act, 1893, uncertain who was the personal representative of the deceased mortgagee, and that the Court had jurisdiction to make an order vesting the mortgaged land in the mortgagor. *In re* COOK'S MORTGAGE - - - 700

—— Costs barred by Statute of Limitations—Allowance on taxation - - 202
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VENDOR AND PURCHASER—*Condition limiting Commencement of Title—Objection to Prior Title as shewn aliunde—Application for Return of Deposit—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78).] Upon a sale of land as belonging to the vendors in fee one of the conditions of sale provided that the title should commence with a conveyance dated in 1869, and that the prior title "shall not be required, investigated, or objected to." The purchaser refused to complete his purchase, and took out a summons under the Vendor and Purchaser Act, 1874, for the return of his deposit, on the ground that he had discovered aliunde that, by reason of the will of a testator who died prior to 1869, the grantor in the deed of 1869 had only a life estate in the property, and that consequently the vendors could not shew a title to the fee:—*Held*, that the purchaser was bound by the condition; that it precluded him from raising the objection to the title, and that the summons must be dismissed.—But, whether the vendors could enforce specific performance of the contract, *quære.*—*Darlington* v. *Hamilton* (Kay, 550) discussed. *In re* NATIONAL PROVINCIAL BANK OF ENGLAND AND MARSH - - - 190

VENDOR AND PURCHASER—*continued.*

2. —— *Conditions of Sale—Title, restricting Objections to—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78)—*Order declaring Good Title—Discovery of Material Facts since Order—Proving Bad Title aliunde—Action of Review—Counterclaim—Form of Judgment—Executor—Mortgage for his own Benefit.*] On the sale by auction by a mortgagee of a leasehold house, one of the conditions of sale provided that the purchaser should be furnished with an abstract of the lease, of the assignment of the lease, and of the subsequent title, and should not make any objection in respect of the "intermediate title" between the lease and the assignment, "notwithstanding any recital of or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the said assignment vested in the assignees a good title for the residue of the term."—Subsequently to the sale the vendor's solicitor communicated to the purchaser information obtained from the mortgagor prior to the sale as to the intermediate title, and tending to throw suspicion on the vendor's title to sell at all, whereupon the purchaser took out a summons under the Vendor and Purchaser Act, 1874, to have it declared that the title was not such as he ought to be compelled to accept:—*Held*, by the Court of Appeal (reversing Kekewich J.) that the condition cast upon the purchaser the burden of proving a defective title, and that, to relieve him from his contract, it was not enough for him to shew merely that the title was doubtful or open to suspicion; and, therefore, that the vendor was entitled to a declaration that a good title had been shewn "according to the terms of the contract."—*Per* Court of Appeal: *Semble*, a purchaser who can obtain the legal estate cannot evade his contract on the ground that he is unable to get a complete string of covenants for title.—*Per* Kekewich J.: Where a good title has been declared on a summons under the Vendor and Purchaser Act, 1874, the purchaser is not at liberty to reopen the question by way of review, unless he can prove that since the order on the summons he has discovered material facts, which he could not with reasonable diligence have discovered earlier, shewing that the title is defective; in which case he may bring an action of review, the jurisdiction of the old Court of Chancery as to allowing proceedings by way of review being still exercisable by the Chancery Division of the High Court: but, *semble*, an action of review can now be commenced without leave.—If the vendor has brought an action for specific performance, the purchaser may bring his action of review by way of counterclaim to the vendor's action.—Form of judgment on such counter-claim.—A condition that a title for a certain period shall not be required, investigated, or objected to, is good, and can be enforced against a purchaser. Judgment of North J. on this point, in *Re National Provincial Bank of England and Marsh* ([1895] 1 Ch. 190) followed.

VENDOR AND PURCHASER—*continued.*

—Forms of conditions restrictive of the purchaser's objections to title considered.—A mortgage of a term of years by a legal personal representative solely for his own benefit, which is bad as being a breach of trust, cannot be treated as, at all events, operating on such estate as he can pass in his character of legal personal representative. *In re* SCOTT AND ALVAREZ'S CONTRACT. SCOTT *v.* ALVAREZ - - - **C. A. 596**

2. —— *Specific Performance—Power to Rescind if Requisitions not withdrawn—Election—Wilful delay—Negotiations with third person.*] A vendor's power to rescind the contract may be exercised only in good faith.—Where a vendor having such power under the agreement took advantage of it for purposes of delay while he opened negotiations, unknown to the purchaser, for sale to a third person:—*Held*, that by his conduct he deprived himself of his election to affirm the contract, and the purchaser was entitled to treat it as rescinded. SMITH *v.* WALLACE [385

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—— Trust for a class—Period of ascertaining class - - - - - **91**
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VOLUNTARY WINDING-UP—Rent after commencement of winding-up - **378**
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WATER—Supply of—Local authority - **168**
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—— Underground - - - - **145**
See WATERCOURSE.

WATERCOURSE—*Underground Springs—Interference with Flow of Water—Injunction—Motive not material—Bradford Waterworks Act*, 1854 (17 & 18 *Vict. c. cxxiv.*), *s.* 49.] The Plaintiffs were the owners of waterworks which they had purchased from a company which had constructed them under the powers of a special Act. The Act authorized the company to take the water from some springs called Many Wells, and sect. 49 provided that it should not be lawful for any person other than the company to divert in any other manner than by law they might be legally entitled any of the waters supplying or flowing from the springs called Many Wells, or to sink any well or pit or do any matter or thing whereby the waters of the said springs might be drawn off or diminished in quantity. The Act contained no provision for compensating landowners whose rights were affected by this section. The company accordingly appropriated the water of Many Wells Springs, and the Plaintiffs continued to do so.—The Defendant, who owned

WATERCOURSE—*continued.*

land adjoining the Many Wells Springs, proposed to construct through his own land an underground tunnel, with the avowed purpose of draining some beds of stone lying under his land, the effect of which would be to diminish, if not to cut off entirely, the flow of water to and from the springs. The Plaintiffs alleged that the Defendant was not acting bonâ fide, but with the object of forcing the Plaintiffs to buy him off:—*Held*, (1.) That, on the construction of sect. 49 of the Act, the Defendant was not prohibited from doing anything that he was legally entitled to do independently of the Act; (2.) that, as the owner of the adjoining land, he was legally entitled to interrupt the water percolating underground through his land to the Plaintiffs' springs; and (3.) that, as the Defendant was legally entitled to make the tunnel, his motives and object in making it were immaterial. An injunction to restrain the Defendant from making the tunnel was therefore refused.—Judgment of North J. reversed. CORPORATION OF BRADFORD *v.* PICKLES - - - - **C. A. 145**

WATERWORKS—Local authority—Supply of water - - - - **168**
See LOCAL GOVERNMENT.

WILL—*Construction—Condition in General Restraint of Marriage.*] A testator by his will bequeathed his residuary personal estate to trustees, on trust for his daughter for her separate use for her life, and after her death in trust for her children, with a gift over, in default of children, to other persons. By a codicil the testator stated that, in consequence of the nervous debility of his daughter, his will was that she should not marry; and, in case of her marriage or death, he directed that his trustees should hold his residuary estate in trust for the persons mentioned in the gift over in the will.—After the death of the testator the daughter married, and in a suit to administer his estate Wigram V.C. decided in 1843 that the limitation over contained in the codicil, being in general restraint of marriage, was void as regarded the daughter's life interest, and that she was entitled to the income during her life. She died in 1894, leaving children:—*Held*, that the will and codicil must be construed together; that the true construction was that the property was to go over upon the marriage or the death of the daughter, whichever should first happen; and that, as it could not, as had been already decided, go over upon her marriage, the daughter's children were entitled to the fund. MORLEY *v.* RENNOLDSON **C. A. 449**

2. —— *Construction — Mixed Fund—Realty and Personalty—Rateable Payment of Legacies.*] When a testator bequeaths legacies and then bequeaths the residue of his real and personal estate, the legacies are charged upon the real estate or its proceeds, but they are payable primarily out of the personalty, unless the testator directs that they are to be paid out of the mixed fund, in which case they are payable rateably out of realty and personalty.—The dictum of Jessel M.R. in *Gainsford* v. *Dunn* (Law Rep. 17 Eq. 405), to the effect that without any such direction the legacies are payable rateably out of realty and personalty, is inconsistent

WILL—*continued.*

with, and must be taken to have been overruled by, the decision of the Court of Appeal in *Elliott* v. *Dearsley* (16 Ch. D. 322). *In re* BOARDS. KNIGHT *v.* KNIGHT - - - - 499

3. —— *Construction — Precatory Trust—"I wish them to bequeath the same."*] A gift purporting to vest the subject of a testator's bounty in a legatee absolutely and for his own benefit is not confined to a life interest or made subject to a precatory trust merely by an expression of the testator's wish that the legatee shall, by will or otherwise, make a disposition in favour of others which could equally be effected by the legatee through his beneficial ownership.—*Malim* v. *Keighley* (2 Ves. 333, 529 a) held not consistent with *Lambe* v. *Eames* (Law Rep. 6 Ch. 597), and not followed. *In re* HAMILTON. TRENCH *v.* HAMILTON - - - - - - 373

4. —— *Conversion—Specific Devise of Real Estate—Lease by Testator with Option of Purchase—Codicil confirming Will—Exercise of Option after Death of Testator—Destination of Purchase-money.*] Testator by his will, dated in 1886, specifically devised certain freeholds, and bequeathed his residuary real and personal estate to other persons.—On the 10th of June, 1890, he made a codicil, which did not in terms refer to the specifically devised property, but expressly confirmed his will. On the same day (but whether before or after the execution of the codicil was not known) he granted a lease of the specifically devised property, with an option of purchase to the lessee. After the testator's death the lessee exercised his option by purchasing the property. Upon a summons raising the question whether the purchase-money belonged to the specific devisee or fell into residue:—*Held*, that, whether the codicil was executed before or after the lease, the testator must have known of the existence of the latter, and by confirming his will had indicated a sufficient intention to pass whatever estate he had in the property to his devisee, so as to take the case out of the general rule established by *Lawes* v. *Bennett* (1 Cox, 167).—The principle recognised by Wood V.C. in *Weeding* v. *Weeding* (1 J. & H. 424) applied.—*Emuss* v. *Smith* (2 De G. & Sm. 722) followed. *In re* PYLE. PYLE *v.* PYLE - - - 724

5. —— *Estate of Trustees—Copyholds—Devise of Freeholds and Copyholds to Trustees and their Heirs—Trusts to Pay Rents to A. for Life and after her Death for such Persons as she should appoint—Estate commensurate with purposes of Trust—Estate of Inheritance—Copyhold Title.*]

WILL—*continued.*

A. B. devised to trustees, their heirs and assigns all his freehold and copyhold estates, upon trust to pay the rents thereof to C. D. for life for her separate use; and after her death he directed them to stand seised of such estates in trust for such persons and purposes as she should by will appoint; and, in default of appointment, he devised the estates to her in fee.—After A. B.'s death, the trustees were admitted tenants of the copyholds; and they all died during the lifetime of C. D.—By her will C. D. appointed certain persons her trustees, and directed them to sell the copyholds and assure them to the purchaser, his heirs and assigns. After C. D.'s death, her trustees sold the copyholds by auction, and declined to shew the purchaser the devolution of the copyhold title from A. B.'s surviving trustee, on the ground that under A. B.'s will his trustees only took an estate for the life of C. D., and that there was an executory devise to her in default of appointment, which had taken effect:—*Held*, (1.) that under A. B.'s will his trustees took an estate of inheritance in quasi fee simple; (2.) that C. D.'s will operated as an exercise by her of her power of appointment; and (3.) that the legal estate in the copyholds remained vested in the surviving trustee of A. B.'s will, and the title thereto must be deduced accordingly. *In re* TOWNSEND'S CONTRACT - - - - 716

6. —— *Satisfaction—Debt payable by Testator within three months of Death—Legacy to Creditor of greater Amount—No Time fixed for Payment of Legacy.*] A legacy of £400, as to which no time of payment was fixed by the testator:—*Held*, not to be in satisfaction of a debt of £300 payable to the legatee by the testator within three months of his death.—*In re Dowse* (50 L. J. (Ch.) 285) followed. *In re* HORLOCK. CALHAM *v.* SMITH - - 516

—— Gift to charity—Mortmain - - 422
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